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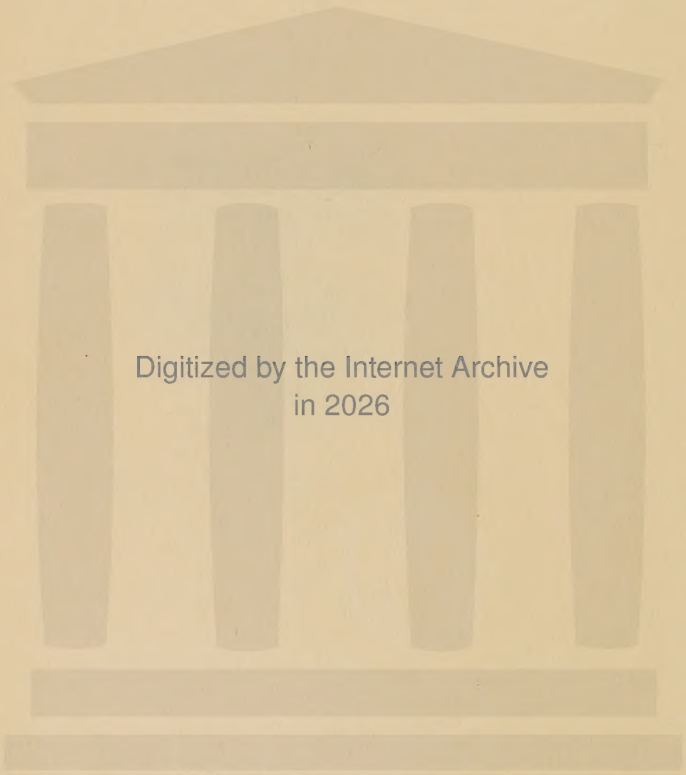
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PREFACE

THIS is the twelfth volume of *Current Legal Problems*. It contains, together with Professor Sir David Hughes Parry's Presidential Address to the Bentham Club, the public lectures which were delivered in the Faculty of Laws of University College, London, during the Session 1958–59.

We wish to thank the contributors, publishers and printers for their co-operation in securing the speedy production of this Volume, and our colleague, Dr. B. Cheng, for his work as Assistant Editor.

THE EDITORS

UNIVERSITY COLLEGE, LONDON,
May, 1959.

REFLECTIONS ON THE PROCESS OF LAW REFORM

David Hughes Parry

It is befitting, if indeed not obligatory, that some aspect of Law Reform should be discussed in a Presidential Address to members of the Bentham Club. So I have chosen to record some reflections upon a process which I have followed with great interest and in which I have been privileged to partake in a small and humble way.

The late Chief Justice Arthur T. Vanderbilt, in his stimulating book entitled *The Challenge of Law Reform*, having described the purpose of law reform as the improvement of the administration of justice in the courts, goes on to emphasise that the great task of the law reformer in the second half of the twentieth century is the simplification and modernisation of the corpus of our substantive law and procedure to bring them into line with the needs of our time. Ours is a rapidly changing civilisation; and the courts cannot hope to decide today's controversies adequately with the outmoded rules and procedures of bygone centuries.

Though the ultimate objective and the specific task of the law reformer may be reasonably clear, the process by which he can hope to reach his objective and accomplish his task seems indeed unnecessarily long and arduous. He has to press on continuously and determinedly for long intervals through layers of solid resistance (passive rather than active), until he finds himself on the point of collapsing through sheer exhaustion or having to be satisfied with a compromise; and even if he is wholly successful, he may well ask himself whether, after all, the end achieved really justifies the energy consumed in the effort. So I would like to discuss in general terms the process of law reform in England and Wales.

Forms of Passive Resistance

The first step in the process is to convince people that reform is required. This, even today, is not quite as easy as it looks. In a broadcast talk on Law Reform,[1] Professor Goodhart lists the forces which constitute a hindrance to legal reform. The first hindrance he mentions is the firm prejudice in some people against any alteration in the law: "Even today," he says, "there are some people who tend to regard any alteration in the law as impious." The second obstacle he refers to is indolence: "Having once become accustomed to a rule, the ordinary man dislikes the mental effort which any change will entail on his part." The third hindrance mentioned is the fear of change: "The view that it is better to accept the evil one knows rather than risk an evil of which one is ignorant." The fourth obstruction given us is lack of knowledge of what can be done: "It may be recognised that a rule is not working in a satisfactory manner, but nevertheless it may be difficult to suggest that a better rule can be substituted for it." The final and greatest hindrance which Professor Goodhart mentions is the lack of adequate machinery, especially in Parliament. To this deficiency I intend to refer more fully at a later stage.

It will be realised that the first three hindrances mentioned by Professor Goodhart tend to explain, though not to excuse, the passive resistance to changes in the law. I would like to mention a further hindrance encouraging the same kind of resistance. The study of historical origins and developments often tends to engender an unwholesome respect for rules, procedures and institutions that served their purpose well in their day but have long become outmoded encumbrances. Many of the valuable legacies bequeathed to its own and subsequent generations by the Historical School of Jurisprudence have often been eloquently extolled. But I must point out that its disservice to the process of law reform has been generally overlooked.

The conception of law as a natural, even inevitable, growth deriving from a people's inherent conviction of right and justice

[1] See *Law Reform and Law Making* (a reprint of a series of broadcast talks, 1953), pp. 14–23.

is not exactly the right atmosphere in which to stimulate an appreciation of the need for planned and deliberate changes in the law. On the contrary, it tends to foster a backward-looking generation with its emphasis on stability, rather than a forward-looking profession concerned about improvements designed to ensure that justice is efficiently administered. Professor Roscoe Pound has pointed out [2] (and with great force, I believe) that Bentham did not have to encounter the Historical School of jurists in the full tide of its strength. It had existed for only two decades in Germany and had not yet arisen in England at the time of his death. Savigny's influence in the English-speaking world came after Bentham's death; and Sir Henry Maine's first book came a generation earlier; " and when Bentham's principle of utility was preached as the gospel of the legislative reform movement there was no strongly held and urged doctrine to resist it." Two consequences followed from this. In the first place the resistance to the Benthamite reform movement was not as powerful as the resistance was during the nineteenth century to the Field reform movement in the United States; and, secondly, the Benthamite movement continued for a longer period than did the Field movement in the United States. So much so that the property legislation of 1922–26 has not inappropriately been described as a belated outcome of the Benthamite idea of free trade in land.

In the past many notable reforms have been brought about through the efforts of individuals and groups of persons connected with the law and its administration. As Professor Goodhart has pointed out " it is not an exaggeration to say that the reforms in the law relating to Real Property which culminated in the seven Acts of 1925, can be attributed almost entirely to the small group of professional experts who felt that the machinery they were working was clumsy and out of date." [3] But it cannot be said that the legal profession as a whole is law-reform-conscious. In my view the law reform process would be greatly eased and shortened if the legal profession as such were really convinced of the need and indeed the urgency of reforms; and if it were

[2] *Field Centenary Essays* (1949), p. 5.
[3] *Law Reform and Law Making* (1953), p. 19.

persuaded to supply the force that is necessary to ensure steady pressure in overcoming apathy, hesitancy, uncertainty and similar forms of passive resistance.

Prophets and High Priests

In his address to the Society of Public Teachers of Law at their Belfast meeting in 1957 [4] the Lord Chancellor, Lord Kilmuir, referred in the following terms to the special part which could be played by members of that society in promoting law reform: "No one is better qualified than you are to put forward serious and considered suggestions for improvements of the law . . . the response of the general public in this field is small. Legal practitioners can rarely spare the time to consider the need for reform except in regard to isolated anomalies. Much help has been received in the consideration of legal problems from the professional institutions . . . but they cannot be expected to take the initiative frequently in proposing reforms in substantive law."

"In short, your Society is the most promising source for suggestions for law reform and I would ask your members not to hesitate in taking the initiative and to act in the knowledge that, for my part, I shall welcome any suggestions they may submit for consideration."

While venturing humbly to agree with Lord Kilmuir that law teachers may be specially well placed "to put forward serious and considered suggestions for the improvements of the law," I would like to go a good deal further and urge that as a branch of the legal profession, which has grown greatly in numbers and influence during the last forty years, and having regard to the increasing proportions of those entering the profession who pass through their hands, the law teaching profession must henceforth shoulder an increasing responsibility for the general welfare and prestige of the profession as a whole.

I have been rather taken aback in recent years to find that so many of those who occupy positions of leadership in the learned professions think (or at least act as if they think) that the principal

[4] IV (2) *Journal of the Society* (1957), p. 75, at p. 85.

factors in determining the welfare and prestige of their particular professions are length of training for new entrants and a high level of remuneration in return for their particular professional services. They seem to attach little weight to that respectful admiration that still flows from the steady maintenance of high standards of conduct, from the skill and integrity of individual members of the profession and from deep and sincere concern of the profession as a whole for the quality of that which it professes.

The relevance to my immediate purpose of what I am trying to say is this: law teachers have many opportunities to bring home to their students the truism that membership of any branch of the legal profession carries with it responsibility for ensuring the exercise of personal skill and the cultivation of personal integrity. They should also at the same time make it clear that every lawyer carries a share of the duty of contributing in some measure to the improvement of the law and its administration. Lawyers in active practice, as well as judges and teachers of law, from time to time come across instances in which serious injustice may be done to individual clients in consequence of some defect in the law. When such cases occur, the occasional practice of bringing such defects to the notice of some authoritative body such as the Lord Chancellor's Office, or the Home Office, the Bar Council or the Law Society might well be encouraged to develop into a tradition of the profession. The growth of such a tradition would be rapid if every lawyer felt a measure of his own individual responsibility for the quality of the justice administered and for the speed and efficiency of its administration. I firmly believe that the goodwill of the legal profession in law reform is essential. It will assist in accelerating its speed and ensuring its efficiency. I believe also that law teachers could contribute richly by their encouragement to the growth of this goodwill. Walter Bagehot says in one of his works that there are two classes of religious teachers: one, the priests who are the inheritors and jealous custodians of past accredited inspiration; the other the prophet, in whom is vested a like present inspiration. All that is new comes from the prophets; all which is old is retained by the priests. What

will be required more and more among teachers of law in the future is fewer priests and more prophets.

"Politician's Law"

The second step in the law reform process I would regard as the choice of the law to be changed. The Lord Chancellor, Lord Kilmuir, in the address to which I have referred, classified law from the angle of law reform into three branches, namely, "lawyer's law," "administrator's law" and "politician's law"; but he took care to emphasise that there is a great deal of overlap or interplay between these three branches. What I want to say concerns, in the main, the first branch—"lawyer's law."

There are, however, two reflections that I would like to record about "politician's law." This, of course, is enshrined in Acts of Parliament as amplified in many instances by subordinate legislation by Orders in Council, or other orders, rules and regulations having the force of law. And although the reform of any part of our law will for the most part have to be accomplished by Acts of Parliament the process of conceiving, designing and framing those Acts which are meant to change or amend the "politician's law" is an assignment under our democratic form of government for the elected representatives of the people. Sir Cecil Carr puts the responsibility for the form as well as substance of almost all statutory law-making fairly and squarely upon the shoulders of the Government of the day. "Given a sufficient majority in the House of Commons, the Government fixes the legislative programme, gets the legislation it wants and manages to kill any proposed legislation which it dislikes or does not care about." [5] Lawyers as such have no special responsibility in the matter, though, of course, they may have special personal responsibilities as leaders or members of political parties or groups.

The other reflection is this: lawyers, *qua* lawyers, are deeply concerned with the interpretation and application of "politician's law" once it is through Parliament. The form and specific meaning of legislation, in other words, are matters on which the

[5] *Law Reform and Law Making* (1953), p. 74.

different branches of the legal profession as such can legitimately proclaim their views without fear of being charged with interfering with the sovereignty of Parliament. For example, attention has again and again been drawn by lawyers to the defects of the Rent Restrictions Acts. Thus in a recent anonymous broadcast talk the drafting vices of these Restrictions Acts were listed under four heads, namely, " inadequate definition," " hidden meanings," " missing principles " and " plain mistakes." And although the Acts reflect the ups and downs of different political, social and economic theories there is no reason at all why their meanings should be masked and their form confused because their substance involves social, economic and political doctrines. As has so often been advocated, law reform in this sphere should be by way of consolidation and simplification.

" Lawyer's Law "

As for " lawyer's law," it is often assumed that this is necessarily judge-made law; but there seems to be no warrant for such an assumption. The property legislation of 1922–26 was indeed lawyer's law in the true sense of the description, but a good deal of that which was changed or consolidated in that legislation was statute law. And several of the matters that have been referred to the Law Reform Committee are contained in statutes, though admittedly not all recent statutes.

It is noteworthy that matters regarded as " lawyer's law," and even such matters as have been referred by the Lord Chancellor for consideration by the Law Reform Committee, have raised issues of social, economic or public policy. This is clear from the fourth [6] and sixth [7] Reports of that Committee, dealing with the rule against perpetuities and the court's power to sanction the variation of trusts. And as time goes on and the conditions of life get increasingly complex more and more political issues seem to get rolled up in the arid folds of " lawyer's law." So much so that a whole subject may cease to be treated as " lawyer's law " and

[6] Cmnd. 18 (1956).
[7] Cmnd. 310 (1957).

fall into the category of "politician's law." This is in effect what has happened to an important section of the law relating to contracts in restraint of trade, which has been recast in a new mould by the recent Restrictive Practices Act. Many sections of the criminal law and the gaming laws that call for reform involve major considerations of social and economic policies. I mention these matters to illustrate the point that the process of choosing branches of "lawyer's law" for consideration by such a body as the Law Reform Committee is by no means as easy as it might at first blush appear; and as the business of government expands, more matters become political and fewer topics remain mere "lawyer's law."

The terms of reference of the Law Reform Committee are to consider and report on such rules or doctrines as are specifically referred to it by the Lord Chancellor. But we have the Lord Chancellor's open and general invitation of suggestions of topics to be so referred and his assurance that all suggestions will receive careful consideration. So if any member of this audience knows or can think of a suitable topic all he need do is to make his suggestion to the Lord Chancellor's Office or indeed to any member or officer of the Law Reform Committee.

Criteria of Acceptability

The third process I want to mention is that of deciding what reform to effect. For many reasons this is a much more difficult process than would at first sight appear. It necessarily involves an appraisal or judgment based upon values; and one immediately asks what standards can one apply in weighing different possibilities? Do not possible standards vary with time, place and circumstances? I remember reading somewhere some time ago that the agreement that laws, judge-made and others, should be good or serve the common good, is as general as the disagreement on what does serve the common good. No better illustration can be given of this difficulty than the contents of the recent Report of the Law Reform Committee on the Effect of Tax Liability

upon Damages.[8] Three viewpoints were freely argued and no agreed solution could be found.

Experience in other countries relative to the same kind of problems and attempts at their solution may well prove of great assistance in suggesting possible reforms. But the study of Comparative Law has been so generally neglected in this country that there is a great deal of difficulty in obtaining reliable information about such foreign experience; and there is not the special machinery or the personnel to carry out the necessary researches.

It has been the general practice for many years now for standing or special Commissions or Committees to be set up to investigate problems or topics and recommend changes. Speaking generally such bodies have been given secretarial assistance but no research or investigating staff. In consequence, the collection of the minimum body of relevant facts and information for use by the Commissions and Committees has fallen as quite a burden upon the shoulders of members of those bodies who are already fully employed in their own special spheres. This tends to prolong the investigation and to add to their responsibility and labours.

In any case, as will be appreciated, the ultimate decision on what reform to effect rests with Parliament. This means that any special body charged with the duty of investigation and the making of recommendations for reform can only be advisory; and the advice which it offers will stand little chance of being accepted and acted upon unless it satisfies a number of tests. Of course it must be acceptable as the right or expedient thing to do in the general opinion of members of the particular Commission or Committee, whatever may be the standard on which their judgment is based. It must be generally acceptable to lawyers, who as judges or practitioners will have the duty of putting the changed law into effect. It must not be unacceptable to Members of Parliament and particularly to the Government of the day. And here it is relevant to mention once more that Members of Parliament are most jealous of recommendations for reforms involving "policy" decisions on matters of social or economic or public welfare.

[8] Cmnd. 501 (1958).

Machinery

The fourth and final process on which I want to offer reflections is the machinery for effecting reforms. I have already emphasised that reforms even though they be of "lawyer's law" must pass through the parliamentary machine and be, to say the least, not unacceptable to Parliament.

It has often been pointed out that Parliament is not really interested in "lawyer's law." It finds economic, administrative and social questions far more absorbing. Consequently members are reluctant to give time and attention to review legal or judicial processes or rules, unless and until some *cause célèbre* or some accumulation of defects shows reform to be overdue. Moreover, as the Lord Chancellor has pointed out, a seemingly non-controversial matter may unexpectedly prove to have highly controversial facets, or the proposed reform may be in conflict with some aspect of Government policy, or there may be reasons or moods of financial economy that diminish the prospects of the passage of a proposed statute into law.

Nevertheless it is a disappointing and discouraging feature of this final stage of the process of law reform that it has only been as private members' Bills that so many of the reports of special Committees have been implemented, where there has been implementation at all. It ought not to be beyond the power of those who have responsibility in these matters to devise a method of securing the passage into law of recommendations satisfying the three criteria of acceptability that I have mentioned.

Faith and Confidence

I have spoken perhaps pessimistically and discouragingly about the process of law reform for two principal reasons. In the first place I believe that it is a process that must go on, and go on with an increasing momentum as changes in society and government become more rapid and pronounced; for as I heard it expressed recently in a lecture, "the world . . . is not a nice stable world of well-behaved atoms wherein man's reason is dominant, wherein struggle is exceptional, but rather a world of constant change and

flux." And I believe also that those in particular who teach law have the parts of leaders to play in the process of reforming it.

In the second place, " as certain even of your own poets have said ": " Change is so difficult a thing to compass in the face of powerful interests which have good reason to be quite content with things as they are, and patience is so hard a virtue: it needs to be sustained by so resolute a passion, by so unfaltering a will, it makes such great demands on human persistence, that men's hearts fail them and they cease their striving." [9]

Having regard to the common experience, so admirably expressed by Professor Baynes, it seems to follow that the faith and confidence (particularly of leaders) require to be renewed from time to time and determination strengthened in order to carry through to a successful issue tedious tasks in difficult days. If I have succeeded in showing that the process of law reform can be tedious and the obstacles discouraging, I hope I also have said enough to show that the end is worth while. Therefore let your faith be revived, let your confidence be restored and let the struggle go on.

[9] Norman H. Baynes, *Byzantine Studies and Other Essays* (1955), p. 386.

PARLIAMENTARY TRIBUNALS OF INQUIRY

G. W. Keeton

The Origins of the Tribunal of Inquiry

In mid-September, 1957, the Bank Rate was raised from 5 per cent. to 7 per cent. The amount of the increase was unusual, and it naturally produced important repercussions upon the price of stocks, shares, and securities of all kinds. For example, Government stock yielding approximately 5 per cent. became considerably less attractive with a Bank Rate of 7 per cent., and the price dropped sharply. Shortly after the change came into operation there were persistent and widespread rumours, which were reproduced in the daily press, that immediately before the change had occurred there had been a leak of knowledge of the impending change, from which certain persons and firms in the City had profited, in the sense that they had been able to sell considerable quantities of securities in advance of the change, and to obtain a price which would then be substantially higher than it would become after the announcement. Various Members of Parliament asked questions with the object of discovering whether these rumours, which had been widely reported abroad, had any solid foundation. To this members of the Government replied that after making extensive inquiries, they had come to the conclusion that the rumours were baseless. Even so, however, public uneasiness continued, and eventually the Government announced that it had decided to set up a Tribunal of Inquiry, under the Act of 1921, with Lord Justice Parker as Chairman. The inquiry was lengthy, difficult, and at times diverting, but in the end the Tribunal of three members unanimously reached the decision that the rumours were quite unfounded. This naturally put an end to a discussion which had become increasingly embarrassing the longer it had continued. The importance of the inquiry, and of its proper conduct, may perhaps be estimated from the fact that when, some

months later, Lord Goddard resigned his office as Lord Chief Justice, Lord Justice Parker was selected to succeed him.

It is not my intention to discuss the many extraordinarily interesting general aspects of this Tribunal of Inquiry, nor to consider the evidence which was placed before it. It is, however, of importance to lawyers to attempt to give some account of this somewhat anomalous procedure by way of Tribunals of Inquiry in the English legal system. This is not as easy as might have been supposed, for the occasions when Tribunals have been set up are few, and the problems which have rendered them necessary have been widely different in nature and importance. Moreover, the types of investigation for which a tribunal would be appropriate were not enumerated in the parliamentary debates which accompanied the passing of the Tribunals of Inquiry Act in 1921. Indeed, the entire procedure embodied in the Act has something of an improvised air. A Member of Parliament, Captain Loseby, had made certain accusations against the Minister of Munitions, relating to the disposal of Ministry stocks, and as the accusations were pressed, it was decided that they deserved investigation. The ordinary procedure would have been for the House of Commons to set up a Committee of Inquiry, and Committees to investigate accusations of this kind had been set up at frequent intervals from 1688 onwards. Such Committees, however, suffered from the disadvantage that they had no power to examine witnesses on oath, and it was felt by some Members that in the present case, this would stultify the inquiry. What was therefore asked for by the Members who supported Captain Loseby was that a Bill should be introduced giving a Committee of Inquiry the desired power. The Government decided, not only that this inquiry should be armed with such a power, but that provision should be made for all similar inquiries in the future, whenever a Tribunal of the type as defined by the Act was set up. The Attorney-General, Sir Gordon Hewart, in moving the second reading of the Bill, said:

> " The House will observe that the Bill is limited as to the subject-matter of the inquiry, which is to be a definite matter of urgent public importance, and the Bill does not apply except

> to cases where either there has been a Resolution passed by either House of Parliament or an undertaking has been given by a Minister of the Crown to either House of Parliament. When these conditions have been fulfilled the Act may apply. It does not follow that it must apply. If it applies, the tribunal is armed with full powers as to taking evidence on oath, the compelling of the attendance of witnesses, and the compelling of the production of documents. I need not dwell upon the other provisions. I will mention only one. It is expressly provided that a witness before any such tribunal shall be entitled to protection as if he were a witness before a Superior Court of Justice. In other words, a witness is entitled to absolute privilege." [1]

Later in the debate, the Attorney-General added that a Tribunal would have the same powers as a High Court judge to commit for contempt a witness who failed to attend, or who refused to answer questions. Both Houses of Parliament appear to have been a little surprised at the scope of the Bill, and at the Committee stage an amendment was agreed to, removing from Clause 1 the power of a Minister to set up a Tribunal without a prior resolution from Parliament,[2] and on March 24 the Commons accepted an amendment from the House of Lords requiring a resolution of both Houses as a condition precedent to the setting up of a Tribunal, and a further amendment limiting the power to commit for contempt to the form which now appears in section 1 (2) of the Act.[3]

When the Act was passed, a Tribunal to investigate Captain Loseby's allegations was set up, its members being Lord Cave, as chairman, Lord Inchcape and Sir William Plender, a distinguished accountant. The proceedings were relatively brief, and Mr. Austen Chamberlain on behalf of the Government (and in the absence through illness of the Prime Minister, Mr. Bonar Law) was able to report to the House on June 16, 1921, that the Tribunal had found all the allegations baseless, so there appeared to be no further

[1] 139 H.C.Deb. 5 s., col. 189.
[2] *Ibid.*, col. 398.
[3] *Ibid.*, col. 2815.

action to be taken. This was acquiesced in without debate, although some contemporary press comment pointed out that the Government had taken no part in the proceedings. Indeed, the Government of the day plainly took the line that it was in no way concerned in the matter, and it therefore preserved a strict neutrality. This extended to the Law Officers of the Crown, and Captain Loseby was left to attempt to substantiate his allegations against a powerful Government Department as best he could.

This brief account of the inception of Parliamentary Tribunals of Inquiry leaves much unexplained, especially in relation to their origin and to their future development, but in one respect this first Tribunal set the pattern for future Tribunals, in that it was small in numbers, as compared with Parliamentary Committees of Inquiry. Because they now were assimilated in many respects to courts of law, they were presided over by a distinguished judge, whilst their other members (usually two in number) would normally have relevant expert or professional skill. This fact, coupled with the power to elicit evidence on oath, and the immunity of witnesses from all subsequent legal proceedings in respect of the evidence they gave, was considered adequate to secure a thorough and impartial investigation, and it may well be (although this did not emerge in the debates on the Bill) that the parliamentary history of the previous three decades had a decisive influence upon the shaping of this Act. In this period before it was passed there had been several celebrated Committees and Commissions of Inquiry. Of these, the best known and the one which aroused the bitterest Party feelings, was the Marconi Inquiry in 1912, of which possibly the best brief account is given in Chapter 25 of Lord Oxford and Asquith's *Memories and Reflections*. In June, 1911, the Imperial Conference passed a resolution to establish a chain of State-owned wireless telegraph stations through the Empire, and the Marconi Company was invited to tender. This tender was accepted by the Postmaster-General, Mr. Herbert Samuel, in March, 1912, subject to Parliamentary confirmation. Coincidently, there were widespread rumours which eventually took form in two allegations, implicating several members of the Liberal Government. These were:

(1) That certain Ministers had corruptly favoured the Marconi Company in obtaining the contract because the Managing Director, Mr. Godfrey Isaacs, was the brother of the Attorney-General, Sir Rufus Isaacs;

(2) That certain Ministers, making use of the knowledge which they had acquired as Ministers, had dealt on the Stock Exchange in the shares of the Marconi Company, at very considerable profit to themselves.

This, of course, is exactly the type of public matter to which the Act of 1921 would now be applicable. In 1912, it was investigated by a House of Commons Committee of Inquiry, which issued its report on June 13, 1913. The Committee comprised fifteen members, selected necessarily from the two major Parties in the House, and it is therefore a criticism of this type of procedure that there was both a Majority Report and a Minority Report. The Majority Report represented the views of eight Liberal Members, and the Minority Report those of six Conservative Members. Both reports acquitted the Ministers of all suggestion of dishonesty, but the Minority Report thought that there had been "grave impropriety" in some of the transactions, whilst the Majority Report did not. When the Report was published, the Conservative Opposition put down a motion of censure on the Ministers concerned. This was moved by Mr. Cave, the future Lord Chancellor and the Chairman of the first Tribunal of Inquiry, and after a most acrimonious debate, it was lost by 346 votes to 268, the division being purely on Party lines. Many of the participants in that debate were still Members of Parliament in 1921, and they undoubtedly remembered the bitterness engendered in the debate in 1913.

The Parnell Commission 1888

During the First World War there were widespread allegations in Parliament and the press of incompetence in handling the operations both in the Dardanelles and Mesopotamia, and in response to pressure the Government agreed to set up two special Commissions of Inquiry. These, however, functioned under the Special Commissions (Dardanelles and Mesopotamia) Act, 1916, and they

represented something of a transition between the Parliamentary Committee of Inquiry and the modern statutory Tribunal. In their results, they can scarcely be regarded as strikingly successful, for although they brought to light, as may have been expected, some errors of judgment and individual mistakes, their own conclusions were just as much open to criticism as the activities of those whom they set out to investigate. One reason for this was the clear failure of these Commissions to distinguish between fact-finding and the expression of opinions which themselves were highly controversial.

Before discussing them further, however, it will be valuable to discuss an earlier Commission in which the origin of the modern Tribunal is unquestionably to be found. During 1887, at the height of the first Home Rule Controversy, *The Times* published a series of articles, entitled "Parnellism and Crime," accusing Parnell, the Irish Nationalist leader, and his associates of complicity in the lawlessness which was widespread in Ireland. The articles culminated, on April 18, 1887, in the publication by *The Times* of the facsimile of a letter, purporting to be written by Parnell himself, and condoning the Phoenix Park murders some years before. In the House of Commons Parnell indignantly pronounced the letter a forgery, and asked for a Committee of Inquiry to be set up. The Conservative Government of the day would grant an inquiry only if the question of the authenticity of the letter was linked with the question of the connection of the Irish Nationalists with agrarian outrages in Ireland. If this was done, it was obvious that the inquiry would have to be armed with powers to obtain evidence on oath, and that legal assistance for the examination of witnesses would be needed. Accordingly, there was passed the Special Commission Act, 1888, the terms of which strikingly anticipate those of the Tribunals of Inquiry Act, 1921, in its provision for compelling the attendance of witnesses, their examination on oath, the production of documents, and the power to punish for contempt. Finally, it provided that the witnesses should have complete immunity (except for perjury) for evidence given before the Commission.

The intention was therefore to assimilate as far as possible, the

proceedings to those in a superior court, more especially as it was assumed from the first that legal representation would be allowed for any person appearing at the inquiry. The Special Commission which was appointed in pursuance of this Act was impressive. It comprised three High Court judges, Hannah, A. L. Smith and Day (the first two of whom were later promoted to the Court of Appeal), and although their appointment was denounced by the Parliamentary Opposition, on the grounds that all three were known to have had Conservative affiliations before being elected to the Bench, both their report and their conduct of the inquiry clearly show that they were in no way influenced by their former political loyalties.

The long and extraordinarily interesting inquiry followed an unusual pattern. It was nominally held to determine two things: (1) whether the Parnell letter in *The Times* was a forgery; (2) whether the Irish leaders were fomenting sedition in Ireland. As far as the first point was concerned Parnell could be regarded as the complainant, or plaintiff. On the second point he was very clearly the principal defendant. When, as occurred, the fact that the letter was a forgery was proved during the inquiry, that left Parnell as the chief defendant in the only matter remaining before the Commission, and on this question Parnell and his associates were found guilty of complicity. Both the principal English parties claimed a victory—the Liberals because the forgery in *The Times* had been exposed, the Conservatives because their thesis that the Nationalists were promoting civil discord in Ireland had been proved.

This, today, is perhaps not so important as the parts played by leading parliamentary lawyers in the inquiry. At that time, the Attorney-General was still allowed to accept private work if it did not interfere with his official duties. The Conservative Attorney-General, Sir Richard Webster (afterwards Lord Chief Justice Alverstone), had already represented *The Times* in *O'Donnell* v. *Walter*, a libel action which arose out of the articles on "Parnellism and Crime." He now agreed to represent *The Times* before the Commission, whilst Sir Charles Russell (a future Liberal Attorney-General and later Lord Chief Justice, and the first Lord

Russell of Killowen) and Mr. H. H. Asquith (a future Liberal Prime Minister) appeared for Parnell. There were some who thought that Sir Richard Webster's actions identified the Government too clearly with *The Times*. Professionally, however, Webster was acting entirely properly (although the practice was changed after this episode), and in view of the fact that it was known beforehand that Russell was appearing for Parnell, it would seem that Webster had little choice. Indeed, if anyone's conduct merited criticism, it was Russell's. He had a general retainer for *The Times* which he relinquished in order to be free to defend (if that is the appropriate term) Parnell. However, the main point which emerges from this important anticipation of the modern tribunal is that although the Attorney-General appeared, it was on behalf of a party involved in the inquiry, not as now, to help the court in the elucidation of facts. The disappearance of the Attorney-General's right of private practice prevented the situation existing in the Parnell Inquiry from recurring, and the present practice has only been evolved by experience.

One point which has affected all the recent inquiries was of importance in the Parnell Inquiry. The terms of reference set out in the Act were in broad terms, and of course no one was being formally charged with a specific breach of the law. That meant that the scope of the evidence would inevitably be wide, and that questions of relevancy and admissibility of evidence would necessarily arise. For example, it could be assumed that various witnesses, and particularly the Nationalist leaders, would accept the opportunity to discuss policy and politics in Ireland. There was also the important question whether the judges should receive hearsay evidence. A perusal of the proceedings, however, shows that the Commission tried hard, and with a considerable measure of success, to confine evidence to that which was relevant, and that which was legally admissible, even though the *weight* which might be attached to that offered by some of the quaint characters who appeared before the Commission might be negligible. The main difference between this inquiry and any ordinary legal proceeding was that a good deal of opinion evidence was admitted.

The experiment of the Parnell Commission was not repeated

before 1914, although there were a number of people who thought that it might well have been adopted for the Marconi Inquiry. There were, however, two other Special Commissions during the War of 1914–18, operating under Acts whose terms were similar to those of the Act creating the Parnell Commission, and also to those of the Tribunals of Inquiry Act, 1921. Once again the power to compel the attendance of witnesses, to compel the production of documents, and to give evidence on oath, together with the power to commit for contempt appear in the Special Commissions (Dardanelles and Mesopotamia) Act, 1916. The actual proceedings of these two Commissions, however, are not of great importance in the development of the modern Tribunal of Inquiry. The Commissions assembled a great deal of evidence of varying kinds, and the conclusions which they drew from it are highly controversial. It is difficult to resist the inference that these Commissions were not a success because the legal element in them was practically non-existent. Lord Justice Pickford, it is true, sat on the Dardanelles Commission, along with nine other persons, who included a Field-Marshal, an Admiral, a former Foreign Secretary, and several Members of Parliament. The Mesopotamia Commission was very similar in composition, except that there was no judge or prominent lawyer amongst its members. The result was that little discrimination was used in the reception of evidence, and the Conclusions of the Commissions were hotly debated, and carried little weight in comparison with those of the Parnell Commission.

The Modern Tribunals

Since the Tribunals of Inquiry Act was passed in 1921, fourteen tribunals have been set up. The inquiries have varied considerably in subject-matter and importance, and it is only possible to discuss here those which have been of importance in the establishment of the modern practice. Besides the tribunals discussed below, however, there was an inquiry into the conduct of the police in London in 1925 in the *Sheppard* case, an inquiry into the dismissal of two police constables at Kilmarnock in 1926, and an inquiry into the conduct of the St. Helen's Watch Committee in 1928. After the

Savidge Inquiry, which is discussed below, there was an inquiry into charges of corruption against members and officials of the Glasgow Corporation in 1933, and a Tribunal was set up to investigate similar charges against officials at Newcastle in 1944. A Tribunal was also set up in 1940 to ascertain the causes of the loss of the submarine *Thetis*, and there was also a minor inquiry arising out of a conviction of two boys at Hereford in 1943. In addition, in 1928 an inquiry was set up under the Act to investigate drainage in Doncaster. Although established under the Act of 1921, its work was really that of a Royal Commission.

The Savidge Tribunal was set up in 1928 in consequence of complaints about police methods and procedure, following a police court case in which an elderly writer on political subjects and a young woman were charged with unseemly behaviour in Hyde Park. They were acquitted by a magistrate's court, but it was alleged that afterwards, in view of a possible prosecution of two police officers for perjury, the young lady had been "grilled" for over five hours, without being given the opportunity to communicate either with her relatives or with a solicitor. Criticisms of police procedure were so widespread that a Tribunal of Inquiry was set up to discover exactly what had occurred. The Tribunal found that a certain amount of pressure had been used to secure statements, and it was in consequence of the findings of this inquiry that what are known as the Judges Rules were revised. This inquiry was presided over by Lord Justice Bankes, the other two members of the Tribunal being Members of Parliament, one of them a well-known lawyer. In this inquiry the witnesses were few, and its subject-matter comprised specific charges against the police. In these circumstances, as both the main witnesses and the police were legally represented, the procedure proved effective to establish the facts. Their interpretation, however, was not free from difficulty, and this is the only inquiry in which more than one report was presented.

None of these inquiries was, in the broad sense, political, and although legal representation was permitted, the Law Officers of the Crown took no important part in them, and no questions of

the admissibility of evidence appear to have arisen. They therefore fall into a rather different category from the three other inquiries, which may be regarded as having developed the modern practice applicable to such Tribunals.

These three Tribunals have a number of common features. All three were set up to investigate allegations of breaches of confidence and of impropriety affecting the transactions of public business, and affecting, more or less closely, the conduct of Ministers of the Crown. They therefore deal with matters to which, in an earlier age, the cumbrous machinery of impeachment might have been applied. There is, however, a fundamental difference between the two procedures. In an impeachment, for all its cumbrousness, definite charges were preferred against specific persons, who therefore had full opportunity of preparing answers to them. A Tribunal of Inquiry, on the other hand, has the difficult task of conducting a general inquiry into matters which are sometimes based upon nothing more than rumours. In such a case, therefore, a very great responsibility devolves upon the Tribunal itself in respect of the difficult question as to how far the inquiry shall range, and what kind of evidence it shall receive. The Act itself, it should be remembered, lays down no guidance at all upon this point.

In 1936, a Tribunal was set up to investigate allegations that there had been an unauthorised disclosure of information relating to the Budget for private gain. The Tribunal was constituted by Sir John Simon, who was at that time Home Secretary, and its members were Mr. Justice Porter (later Lord Porter, a Lord of Appeal in Ordinary), Mr. Gavin Simonds, K.C. (now Lord Simonds, a Lord of Appeal in Ordinary and a former Lord Chancellor), and Mr. Roland Oliver, K.C. (later Mr. Justice Oliver). This Tribunal reported that there was an unauthorised disclosure of information relating to the Budget to Sir Alfred Butt, who had made use of it for his private gain. In many respects, this was a transitional inquiry, and the limitations of the existing procedure which this inquiry brought to light were improved upon in the two following inquiries. For example, this was not an inquiry in which the

Attorney-General discharged the functions assumed by him in the two later inquiries. At the beginning of their Report, the Tribunal of 1936 made certain comments of very considerable importance upon the question of procedure. They observed:

> "In the ordinary criminal case, with which the present inquiry may perhaps be contrasted, a definite charge is made against a particular individual, and all evidence not strictly germane to that charge against that individual is rigorously excluded.
>
> "Moreover the Crown in the capacity of prosecutor is represented by counsel whose duty it is to present to the court the evidence against the accused and to test by cross-examination any evidence which he may give or call. The accused in turn is in most cases represented by counsel who can test and challenge any evidence adduced by the Crown.
>
> "In the case of an inquiry such as that on which we have been engaged there is no prosecutor. Such evidence as the Treasury Solicitor has been able to obtain or as the Tribunal has thought fit to permit or require has been furnished. But the testing of the witnesses' stories by way of cross-examination or otherwise has necessarily been undertaken by the members of the Tribunal themselves, with the resultant possibility of creating the impression that they were from the start hostile to some of the witnesses who appeared before them.
>
> "A further difficulty of the methods adopted is that there were no accused and there was no definite charge. In some cases therefore it happened that persons whose conduct was the subject of the closest scrutiny were not represented before the Tribunal until some days had elapsed, *e.g.*, Mr. Harold Eves and Mr. J. H. Thomas—and in all cases those who appeared to represent such persons were hampered by the inability to object to the reception of evidence in the nature of hearsay and prevented from presenting the case of their clients in the manner in which they would ordinarily have presented it before a court of law in this country.

"In making their report the members of the Tribunal while feeling constrained to adopt the procedure outlined above have felt the difficulty of the situation.

"In reaching their conclusions the Tribunal have confined their attention solely to matters proved in evidence before them.

"They have felt themselves entitled to use that evidence once it has been given whether or no it could strictly have been given in the case of the prosecution of an individual whose conduct has been under their consideration, but at the same time when considering the case of any individual they have put aside all evidence of a 'hearsay' nature.

"We have thought it expedient to set out the matters referred to above, but at the same time we would point out that all persons who desired to be represented before the Tribunal were so represented at such time and in such manner as they wished and we believe we gave full opportunity to all those desiring to do so to give evidence and to examine or cross-examine any witness called before the Tribunal." [4]

The difficulties facing both Tribunal and witnesses are here plainly stated. Where the witness is also a person whose conduct is under suspicion, his situation is extremely difficult. If he is legally represented at the start of the inquiry, the public will draw inferences from the fact. If he is not, his case may be prejudiced before he is legally represented. If he is represented whilst the inquiry is in progress, his counsel are seriously prejudiced by lack of preparation. How seriously they may be handicapped is evident if the position of counsel in this inquiry is contrasted with the position in the Parnell Inquiry. Before the Parnell Inquiry assembled, Parnell and his associates knew what they had to prove in respect of the letters, and what they had to resist in respect of the allegations of their complicity in Irish disorders. What steps their brilliant team of lawyers took to deal with both questions appears from Barry O'Brien's two racy volumes, *The Life of Parnell* and *The Life of Lord Russell of Killowen*. In the 1936

[4] Cmd. 5184 (1936), pp. 3–4.

Inquiry, Mr. J. H. Thomas might justly have complained that he had been condemned, beyond the possibility of appeal, in an inquiry in which no definite charges had been preferred against him, and which his legal advisers had had no proper opportunity to consider, and in an inquiry in which evidence inadmissible in a criminal prosecution was received, even though hearsay was excluded from consideration, when the question of his own culpability was considered by the Tribunal.

The first of the post-war Tribunals of Inquiry was the Lynskey Tribunal of 1948. This lengthy and complicated inquiry was conducted by Mr. Justice Lynskey, Mr. G. Russell Vick, K.C. and Mr. G. R. Upjohn, K.C. (now Mr. Justice Upjohn). In this case, there had been the most widespread rumours that Ministers of the Crown and public officials had accepted money and other rewards in consideration for the grant of licences (usually for importing articles in short supply) and in consideration of the withdrawal of a prosecution for breach of licensing regulations. The entire episode arose out of the quaint system of controls, quotas, and administrative regulations which followed the war, and the inquiry is notable for its revelation of the activities of several highly influential "contact men," especially Mr. Sidney Stanley.

Once again, the opening paragraphs of the Report of the Tribunal throw a good deal of light upon the procedure adopted. In the main the procedure adopted in the 1936 Tribunal was followed, but there was an important development. In view of the complexity of the material to be considered the services of the Attorney-General were obtained, and the Report defines his relation to the Tribunal. It states:

> "3. The first question we had to decide was one of procedure. A Tribunal appointed under the Act of 1921 is itself responsible for the collection of evidence, taking statements from witnesses, presenting their evidence, then testing its accuracy and finally finding the facts. In a simple case it might be convenient for the Tribunal itself to carry out these responsibilities, but where there are a number of transactions to be investigated it would not merely be inconvenient but

physically impossible within a reasonable time for the Tribunal to undertake these tasks.

"4. The services of the Treasury Solicitor, Sir Thomas Barnes, G.C.B., C.B.E., and his staff were placed at our disposal. We also had the assistance of Superintendent A. J. Thorp and other officers of the Metropolitan Police. The Treasury Solicitor with the assistance of the police interviewed all persons whom they thought might be able to give useful information to the Tribunal, and statements were taken from them. These statements were then placed before us, and we directed what further inquiries should be made, and eventually decided which witnesses should be called to give evidence before us.

"5. The Treasury Solicitor, on our behalf, to assist us in the presentation of the evidence and the ascertainment of the facts, instructed the Attorney-General, the Right Hon. Sir Hartley Shawcross, K.C., M.P., Mr. Gilbert Paull, K.C., the Hon. H. L. Parker and Mr. Mark Littman (of counsel). Any witness called on to be called before us who appeared to us to have such an interest in the matters into which we were inquiring as to justify such representation we allowed to be represented by counsel and solicitor. Nineteen witnesses were so represented.

"6. On November 15, 1948, the Attorney-General opened the facts. Thereafter he or one of the counsel appearing with him called the witnesses and examined them in chief on the statements which they had made. Each witness was then cross-examined by the counsel who had examined him in chief. Counsel appearing for witnesses were then given the opportunity of cross-examining each witness. After this cross-examination if the witness giving evidence was represented by counsel, his counsel was then given the opportunity of examining him. In any event there was a final examination by one of the counsel representing the Tribunal.

"7. We devised this procedure as being the most appropriate in the circumstances and it was outlined by the Attorney-General at our first meeting at Church House. We

invited counsel who had at that time been instructed for witnesses and who were appearing before us to express their views upon this form of procedure, and it met with their approval. Our object in adopting this procedure was to obviate the difficulty which had arisen in the case of the Tribunal appointed to inquire into the Budget disclosure in 1936, when the Tribunal found they had to undertake the task of testing the witnesses' evidence by cross-examination or otherwise, and so give to the witnesses an appearance of hostility (Command Paper 5184). We did, of course, where we thought it necessary, question the witnesses to clear up any matter which we thought required further elucidation.

"8. Under the terms of our Appointment the questions we had to consider were:

(1) whether there were allegations of the nature set out in our Appointment;

(2) whether there was any justification in any particular transaction for such allegation;

(3) if we found there was some justification for such allegation, in what circumstances the transaction took place and what persons were involved therein. . . .

. . . . . .

"11. In an inquiry of this nature there is no issue between the parties for the Tribunal to decide, and no defendant to be tried. The Tribunal is appointed to find the facts and to give answers to the questions submitted to it. As the first question asks what allegations have been made, all evidence relating to the making of such allegations is relevant. The statements and evidence of all persons who have knowledge of the transactions concerned are equally relevant to the second question. As the Tribunal is not in a position to give an answer to the first two questions until it has heard the whole of the evidence, and, therefore, may have to deal with the third question in relation to any transaction, evidence given by any person taking part in such transaction and statements made to or by

him are also admissible as potentially such a person may be involved in the findings of the Tribunal in answering the third question.

"12. Much of this evidence would not be admissible in the case of an individual witness in proceedings against him or in litigation in which he was concerned. In coming to a conclusion as to the conduct of any individual witness and in particular whether any allegation made in reference to him has been justified, we have had regard only to such evidence as would properly be admitted in a case in which he was a party and his conduct was in question." [5]

It will therefore be apparent that already by the time of the Tribunals of 1936 and 1948 the Tribunals had met a criticism which is sometimes heard today. In sifting the facts concerning the existence of rumours giving rise to the inquiry, all evidence is relevant. This part of the inquiry is simply fact-finding. When the question of the involvement of a particular person in a particular transaction is under consideration, however, the Tribunal restricts itself to the facts admissible under the normal rules of evidence. This, it may be suggested, is not always so clearly appreciated as it should be, and it may be assumed that this is now settled practice, for in the opening section of the Report of the Parker Tribunal of 1957, dealing with the constitution and procedure of the Tribunal, the Report again enumerates the peculiar problems facing a Tribunal of this kind, and then states that the Tribunal decided to follow the procedure established in 1948. Not unnaturally, there are difficulties even in this method of approach. Thus, since the preliminary part of the inquiry will be occupied with establishing the existence of rumours, and in tracking them to their source, this part of the inquiry will usually be more colourful than the later, and, as the experience of all the recent Tribunals shows, will be lavishly reported in the daily press.

Finally, in February and March, 1959, there was a Scottish tribunal, set up by the Secretary of State for Scotland after prolonged pressure in the press and in Parliament, to investigate

[5] Cmd. 7616 (1949), pp. 1–3.

allegations that a policeman in Thurso had struck a youth named John Waters. In some respects this Inquiry recalls the Savidge Inquiry in 1928, but there was one important innovation. This time, counsel appointed to take the initiative on behalf of the Tribunal held no official appointment. Otherwise, the procedure of the English tribunals was closely followed.[6]

The Effect of a Tribunal's Inquiry

It remains to consider two further points in connection with these Tribunals: (1) what may be described as the effect of an inquiry by the Tribunal; and (2) the problem of a possible appeal. The two questions are closely connected. It scarcely needs to be mentioned that the Tribunal itself has no power either to grant civil redress or to inflict punishment, even if either should be appropriate. Though the Tribunal is in form a Court of Justice, with a number of the attributes of a Superior Court, it is in substance a fact-finding agency. Formally, its report is presented to the Home Secretary or, in Scottish inquiries, the Secretary of State for Scotland, and is published by the Stationery Office as an official paper. Since both Houses of Parliament resolve to set up the Tribunal, they are also entitled to have the report of its decisions communicated to them.

When the Report of the Parnell Commission was presented to Parliament there was a long and acrimonious debate on it. Since the Act of 1921 was passed, however, there has been a clear disposition to accept the Report without debate, as a finding of fact by a high judicial authority, although there may be discussion of the wider implications of the Report. In this respect, procedure by Tribunal may be favourably contrasted with Parliamentary Committees of Inquiry, whose Reports were not infrequently the starting point of fresh political wrangles. Where the Report (as those of the Tribunals of 1921 and 1957 did) finds that the allegations are baseless, that is an end of the matter. The Reports of 1936 and 1948 found that Ministers of the Crown were guilty of

[6] *Cf. Report*, Cmnd. 718 (1959). The Scottish Home Office has also published the proceedings.

improper practices. In both cases the Ministers promptly resigned, after making explanations and apologies to the House, and there the matter has ended. There can be no doubt that, if it thought fit, the House could censure Ministers whose conduct, as disclosed by the Report, merited it. The Report of 1948, however, was interesting from another point of view. It revealed corrupt practices by certain individuals, in respect of which criminal proceedings might have been initiated. These, if the appropriate authorities thought fit, might be instituted, and the preliminary investigations undertaken by the police for the purposes of the inquiry would obviously be of considerable value, but it does not seem that a prosecution could be founded upon a Tribunal's Report. Even in the case of the Parnell Commission, this was not suggested. There exists, however, the difficulty that publicity given to evidence, parts of which would be inadmissible in criminal proceedings, might be thought to have prejudiced the possible accused to such a degree that no criminal proceedings can be instituted.

For the reasons already discussed, there is no question of any appeal from the Tribunal's Report, at any rate in terms of law. The findings of fact, it has been pointed out, are accepted by Parliament as conclusive, though there would appear to be nothing to prevent a debate arising upon them, as in fact did occur upon the Reports of the Parnell, Dardanelles and Mesopotamian Commissions. All these three inquiries, however, though they were nominally fact-finding inquiries, raised questions of wide policy, upon which major differences of opinion might be expected, and in which the conduct of the Government itself more or less directly came under scrutiny. This has not been the case in the inquiries which have been held under the Act of 1921, even though in three of them the conduct of Ministers individually has been in some degree a matter of inquiry. So long as Tribunals do not investigate specific charges it is difficult to see how any provision for appeal could be made, and so long as witnesses whose conduct may be the subject of inquiry are legally represented at the outset, or at an early stage of the inquiry, there does not seem to be any risk of a miscarriage of justice. It may be remarked that had the

present procedure existed at the time of the Budget leak inquiry in 1936, Mr. J. H. Thomas would presumably have been advised by the Attorney-General at an early date to be legally represented.

There is still some risk that the functions of the Attorney-General at such an inquiry may be misunderstood. In particular, there is a risk that sometimes it may be suggested that an Attorney-General may not have pressed his questions to witnesses far enough, at others he may be accused of having pressed his examination too far. The Attorney-General is neither a prosecutor, nor a representative of any witness. He is there to assist the Tribunal, and presumably if, on a particular occasion, an Attorney-General should be thought to have stopped too soon, the Tribunal may instruct him to undertake a further examination. Even so, there is nothing to prevent members of the court from putting questions. In the Tribunals before 1939, they undertook the whole burden of the inquiry. Even today, they participate in it to a much greater degree than a judge in court would expect to do. It may be, however, that in the light of experience gained in the Waters Inquiry, the question whether the Attorney-General in England should necessarily participate in the proceedings should be reconsidered.

A final point may be mentioned, arising out of the Bank Rate Tribunal of 1957. Subsequent newspaper discussions suggested that as the rumours had proved to be unfounded the Tribunal should not have been set up. Such an argument is utterly misconceived. If a Tribunal were not to be set up until rumours were found to have some solid foundation, there would be little point in setting up a Tribunal at all. It would then be for the Government to take such further action as would then be appropriate. It is difficult to see how any rules could be evolved to determine when an inquiry should be instituted. In 1957 the Prime Minister had already asked the Lord Chancellor to investigate the rumours, and he had found them lacking any foundation. Nevertheless, the rumours persisted, and they found some support from some Members of Parliament. A government always has a responsibility to ensure that any doubtful practices affecting the conduct of public business should not be, or appear to be, covered

up. The Tribunal of 1957 finally put an end to rumours that had been widespread and persistent. The only conclusion that can be drawn is that the Government of the day alone can decide, in its discretion, when a Tribunal is necessary. The Tribunal has not replaced the Parliamentary Committee of Inquiry, and there may be occasions when this procedure is preferable to setting up a Tribunal. Generally, however, the procedure under the Act of 1921 has now developed to the point where it can be asserted that it has clearly demonstrated its superiority where " a definite matter of urgent public importance " requires investigation.

LIABILITY FOR RADIATION INJURIES

Dennis Lloyd

Although it has become customary, at least among journalists, to refer to the present uneasy epoch in the world's history as the Atomic Age, it is mainly in the military sphere and in the field of international politics that the common man is most conscious of the impact of the uses of nuclear energy. Yet assuming the world can escape the catastrophe of a nuclear war it is probable that in the next few years the nations will become more and more preoccupied with the peaceful uses of atomic energy as that source of power becomes increasingly employed as a substitute for other forms of fuel, such as coal and oil, as well as being put to a multitude of industrial and other uses. But with this development has come a growing consciousness of new and as yet little understood hazards with which even the peaceful use of these dramatic discoveries in nuclear science and technology may threaten human life and property. At the same time there has come the realisation that these novel threats and hazards have given rise to legal problems of some complexity which call for urgent study, and in some respects at least, for fresh legislative solutions.

Not unnaturally the primary concern of governments has been to concentrate on safety precautions rather than on the provision of legal solutions where these have proved ineffective, and no one would deny that in this field perhaps more than in any other prevention is better than cure. However, some recent events have emphasised that even in the best regulated organisations errors, oversights and miscalculations can still occur, with a resulting train of widespread damage and injury. Lawyers, like doctors, tend to be called in after something has gone wrong and may therefore be pardoned if they give their attention to this aspect of the problem, even though they are doubtless as aware as anyone of the need, so far as is humanly possible, to prevent a nuclear accident. A good deal of attention has been paid to the legal implications of

radiation injuries in the United States [1] but there has been little indication hitherto of a comparable interest among the legal profession of this country. There are signs, however, of a growing appreciation, both in this country and in Europe generally, of the need for facing the implications of this situation. Not a little impetus to this has been given by the recent Windscale mishap which luckily, as events turned out, does not—though it might well have been otherwise—have to be described as the Windscale disaster.

The cause of radiation injuries may be the same physical process of nuclear fission,[2] but for practical purposes there is need to distinguish between two classes of cases. Of these the more prominent is the case of a plant, such as an atomic reactor, whose actual purpose is the creation of highly radioactive fission products, such as plutonium. It is obvious that if as a result of (for instance) an explosion, such products were let loose into the atmosphere and scattered for many miles around, there might well be a major catastrophe whose consequences would fall little short of the dropping of an atomic bomb. The rapid development of the atomic power programme in this country and the spreading of atomic power stations throughout the country makes this class of case far away the more important, especially as the lack of suitable isolated sites and the need to position such plants in reasonable proximity to the places they are intended to serve, must inevitably bring the atomic piles nearer and nearer to the centres of population.

Windscale

Allusion has already been made to the so-called Windscale mishap as serving to underline dramatically the possible hazards which have to be faced. In referring to this again it is with no desire to present an alarmist picture, for it is generally recognised by the

[1] See, particularly, "Atomic Power Development," 21 *Law and Contemporary Problems* (1956), pp. 1–210; 46 *California L.R.* (1958), pp. 1–98; and the *Report of the Workshops on Legal Problems of Atomic Energy* (1956), sponsored by the University of Michigan Law School.

[2] The alternative process of nuclear "fusion," which is said to entail far less risk of atomic fall-out, still remains in the experimental stage: see *Fall Out* (revised ed., 1958), edited by A. Pirie.

experts that the risk of a major leak from an atomic plant is extremely improbable. One of the lessons of Windscale, however, is that it cannot be ruled out altogether as an impossibility, human fallibility being what it is, and that even a comparatively minor outbreak may cause substantial damage to property and financial loss as well as possible human injury. Certainly the possible tort liability has up till now proved a major deterrent in the United States to the use of atomic reactors, though admittedly the element of high cost as against other fuels, which are available more cheaply and in large quantities in the States, has been an even more significant factor.

The Windscale plant is in Cumberland and belongs to the Atomic Energy Authority. Its function was the production of plutonium for military purposes and it contained two reactors.[3] On October 12, 1957, it was announced that emergency action had to be taken to cool down one of these which had become grossly overheated.[4] This particular reactor had been shut down for a routine half-yearly annealing operation, by which the stress in the graphite structure of the reactor is periodically dissipated. This process involves the application of considerable temperatures and in the course of it the uranium in the pile got overheated. Unfortunately delays occurred both in taking suitable steps to lower the temperature of the reactor, and in assessing the possible risk of radioactive fall-out. It seems to have been assumed at first that most of the radioactive air was blowing out to sea and that any contamination was being considerate enough to descend inside the Authority's own property. A little later, however, radioactive iodine was detected in local milk, and deliveries were banned in an area of fourteen square miles. This was later extended to 200 square miles. The radioactive life of iodine is fortunately very short, but some traces of other fission products such as strontium—whose radioactive life is measured not in days but in years—were also detected. As the *Economist* commented at the time[5]: "It is a mercy that, so far as is known, these substances have not been

[3] It has now been announced that both of these are to be scrapped (*The Times*, October 24, 1958).
[4] *The Times*, October 12, 1957.
[5] October 19, 1957, p. 241.

broadcast in dangerous quantities." By the time it was realised that cooling measures would have to be taken and the cooling fans were opened for this purpose, it was already too late for these to be effective. Eventually it was decided to use the old-fashioned remedy of water and after this had been poured on for twenty-four hours the fire finally subsided.[6]

An immediate inquiry was held, but in view of the security aspect, this was held in secret and its official report was not published. A so-called "simplified" report was, however, made available to the public, contained in a government White Paper. The upshot of the findings released in this document was that certain errors were frankly admitted. The physicist in charge of the operation was insufficiently equipped and instructed and had not been supplied with the appropriate manual of directions. There was inadequate instrumentation, and faults of judgment were committed which were admitted to derive from flaws in the organisation. The Authority accepted that the responsibility was a collective rather than an individual one and did not therefore single out individuals for blame or penalty.[7]

The *Economist*, which described the affair as "a major accident," summed up the indictment against the Atomic Energy Authority on three counts: (1) a casual approach to an operation which, by its nature, tempted operators to take risks; (2) a marked reluctance to recognise the development of a dangerous situation; and (3) a belated realisation that any kind of trouble in a reactor of this sort was bound to create a hazard to health. "The Windscale accident," the writer added, "has demonstrated plainly that the most docile reactor . . . is not proof against misuse."[8] For *The Times* the lesson to be inferred was that though other reactors under construction were different from those at Windscale it did not follow that they had not dangers of their own. Referring to the recommendation that an independent expert be appointed the paper added: "No precautions he may prescribe are likely to be deemed excessive, for the most dangerous materials in the world

[6] *Ibid.*, p. 240.
[7] See *Accident at Windscale No. 1 Pile on October 10, 1957* (Cmnd. 302).
[8] November 16, 1957, p. 610.

are being handled at places like Windscale, and the operator who is immune to lapses of attention or care has yet to be bred." [9]

Fortunately there had been no ascertained injury or likelihood of injury to any person but nevertheless there had been, in the words of *The Times*, "a costly and alarming catastrophe." [10] Certainly costly, for the damage to the plant alone ran into nearly two millions, as well as putting out of commission a third of the plutonium producing capacity of the country.[11] Third-party claims were comparatively light, consisting mainly of about £70,000 ultimately paid to farmers for financial loss in connection with milk which was unsold and had to be destroyed.[12]

Legal Liability of Owners of Nuclear Reactors

In this particular instance the Authority admitted liability and has either settled or is in process of settling all the claims to compensation. It is fitting, however, to pause here to consider the nature and scope of legal liability that is imposed on the owner of a nuclear reactor towards those injured or damaged by the escape of atomic radiation. The tendency of our present law of tort seems to be in favour of extending the scope of liability for negligence, while discouraging claims based on strict liability. The development of security legislation under the welfare State has led to the feeling that, broadly speaking, tort liability should be based upon some proof of fault, and that the insurance element in strict liability is better left to be taken care of under social legislation aimed at mitigating the consequences of economic misfortune. Thus, for example, in a common law action an injured workman may recover damages for the negligence of his employer or of a fellow-servant, but a claim under the Industrial Injuries Act is not based on negligence, and compensation is limited to a scale of payments not intended to do more than relieve from destitution a person whose capacity to work has been destroyed or at least impaired.

But the law is not by any means consistent in the application of this theory, and though the inconsistency is to some extent

[9] November 9, 1957.
[10] *Ibid.*
[11] See *The Times*, June 9, 1959.
[12] The *Economist*, July 12, 1958, p. 11.

attributable to history, this is not altogether so, as the creation at the present day of a large number of absolute statutory duties sufficiently testifies. The rationale of such absolute liability in modern times may be sought in various directions, such as the peculiar difficulty of proving negligence in certain circumstances; the feeling that a person should only be allowed to undertake enterprises fraught with special peril to the public save on terms that he should be responsible for any resulting injury; the notion that certain types of dangerous activity may be deserving of encouragement, but that the risk of injury or damage should not fall on the innocent victim, but should be spread among the community. This, it is thought, can be achieved at last in a rough and ready way, by imposing liability on the operator who is able to insure against this liability, and pass on the cost of doing so in due course to the consumer.

Whatever be the precise basis for accepting strict liability in any particular instance it will hardly be disputed that the hazards inherent in operating an atomic reactor are exceptionally qualified to come within this category of liability. For not only are the perils of an immense and indeterminate character, but here is an undertaking engaged upon for the public benefit and one where the risk of injury should in no case be left to lie where it falls. Apart from the very difficult insurance aspect of this problem, which will be considered later, it would certainly impose a very heavy burden on a plaintiff in a case of this sort to require his claim to be supported by proof of negligence.

At common law, however, it seems reasonably clear that a claimant would in most instances be required to adduce evidence of actual negligence before he could recover damages for injury due to a nuclear accident. The great case of *Rylands* v. *Fletcher*,[13] which imposes a strict liability for the escape of things likely to do mischief is, as we know, subject to a number of important qualifications and exceptions. One may perhaps safely assume that, despite the chaotic nature of the decisions on what constitutes a non-natural user for the purposes of that rule, a court would

[13] (1868) L.R. 3 H.L. 330.

experience little difficulty in bringing the operation of a nuclear reactor within that category.[14]

Other obstacles, however, exist to the application of the rule. There must be an escape from the premises where the reactor is situated,[15] and this would at any rate rule out any claim on behalf of any person injured while within the actual boundaries of the premises where the plant is established. As to those injured as a consequence of an escape of radiation to the surrounding territory, there remains the difficulty that the rule of strict liability may not extend to personal injuries or even perhaps personal property as such, though it may well be treated as applicable where such injuries or damage are incidental to the occupation of land.[16] Thus an adjoining landowner who sustains injury to his person while present on his own land may be able to rely on the strict rule of liability, as also in the case where his cattle, grazing on his land, suffer injury. But it may be otherwise if he is injured while visiting a neighbouring friend, or if his cattle suffer injury while being driven on the highway. And, *a fortiori*, any individual who suffers personal injury or damage to his personal property, but who at the time is not actually present on land of which he is the occupier, could not succeed without proof of negligence. These results admittedly seem not a little incongruous, and it should be added that there is considerable authority, though not altogether of a satisfactory kind, for disregarding this distinction between an occupier and a non-occupier of land.[17]

Even so there have also to be borne in mind certain defences to the rule which might well afford an answer to any claim, in some possible circumstances. Thus the defence of act of God, the limits of which remain singularly ill-defined,[18] might apply, for instance, in the case of a reactor plant being wrecked by earthquake. And what of the case where a crashing aeroplane, or if you wish to be

[14] For authorities, see Salmond on *Torts* (12 ed., 1957), pp. 557–559.

[15] *Read* v. *Lyons* [1947] A.C. 156.

[16] This is the view expressed in Salmond, *op. cit.*, pp. 556–557, and Street, *Law of Torts* (1955), pp. 264–265.

[17] Especially, now, *Perry* v. *Kendricks Transport, Ltd.* [1956] 1 W.L.R. 85, where the earlier authorities are discussed.

[18] See Salmond, *op. cit.*, pp. 569–573.

imaginative, a misfired atomic satellite, strikes the reactor, producing wholesale destruction? Moreover, the intervening act of a third party may also constitute a defence to *Rylands* v. *Fletcher*, and for this purpose it is established that the test is whether the intervening act was one that the owner of the dangerous thing ought to have foreseen as likely to lead to its escape, and to have accordingly taken appropriate precautions.[19] In other words, the liability here is virtually indistinguishable from negligence.[20] So, to take the case again of the aeroplane crashing into an atomic plant and causing an explosion, liability might well be excluded on this ground, for even if it could be said that the operator of the plant might or ought to have foreseen the risk of crashing aeroplanes, it is difficult to see what practicable or reasonable precautions could be taken against so remote a contingency.

It would, indeed, be asking a good deal of the ancient common law to expect it to adapt itself almost overnight to the unique perils of a nuclear accident. Such a situation calls almost inevitably for legislative intervention and this has in fact occurred in this country, though perhaps lulled into a sense of false security by the absence of serious mishaps in atomic plants, no such legislation was enacted until 1954 and then, as we shall see, of a severely limited kind. Very recently Parliament has been engaged in extending this legislation in ways to which reference will be made.

The earlier legislation was contained in the Atomic Energy Authority Act of 1954. By section 5 (3) of that Act it was provided that it shall be the duty of the newly created A.E.A. (which is a body corporate engaged under the powers conferred by the Act in running atomic power stations for the government) to secure that no ionising radiations from anything on any premises occupied by them, or from any waste discharged (in whatever form) on or from any premises occupied by them, cause any hurt to any person or any damage to any property, whether he or it is on any such premises or elsewhere. It will be noted that not only does this provision impose the duty in terms far more absolute than under

[19] *Northwestern Utilities* v. *London Guarantee Co.* [1936] A.C. 106.

[20] See *Perry* v. *Kendricks Transport*, n. 17, above; *Behrens* v. *Bertram Mills Circus* [1957] 2 Q.B. 1.

Rylands v. *Fletcher*, so as to eliminate questions as to whether the dangerous thing or substance has escaped from the premises, as to the cause of the escape, or whether harm is done to persons or property, but that it equally imposes no financial limit on the extent of the liability. In fact the section, following the usual statutory pattern, does not explicitly state that a breach is to result in a right to damages by the injured person. None the less this is a necessary conclusion to be drawn from the whole purport of this provision, particularly as no penalty for a breach is specifically laid down.[21] On the other hand, the section is confined exclusively to radiation emanating from premises occupied by the Authority itself, so that no statutory liability arises in regard to radiation from privately owned plant, or in the case of any other type of radiation injury.

Limitation of Liability

Doubtless inspired by the lesson of Windscale as well as by the setting up of "Merlin," the first privately owned atomic reactor in this country,[22] the government announced last February a proposal to introduce new legislation to extend strict liability to the private as well as the public user of atomic reactors.[23] Together with this proposal, however, was linked a further change of a restrictive character, namely, a provision fixing the liability for any one accident at any one installation at £5 million. For this purpose any privately owned reactor would have to obtain insurance to cover such liability. Anything beyond this arbitrary figure is to be regarded as a major national disaster which would result not in a claim to legal compensation but to voluntary action by the government aimed at alleviating hardship.

These proposals are now being implemented by the Nuclear Installations (Licensing and Insurance) Bill, which was introduced into the Lords towards the end of 1958 and has since been passed by the House and is now being considered by the Commons. The Bill does not limit the liability of the Atomic Energy Authority for damage resulting from the escape of radiation from their

[21] See s. 5 (3).
[22] See the *Economist*, July 12, 1958, p. 11.
[23] See *The Times*, February 11, 1958.

own installations, but after imposing strict liability on privately owned reactors, requires these to insure up to a limit of £5 million.[24] If, however, an accident occurs at one of these plants and the Minister considers possible claims are likely to exceed that sum, he must certify accordingly and then lay the matter before Parliament for it to be dealt with as Parliament may determine.[25] Thus, in the case of a disaster arising from a private reactor (as opposed to one run by the A.E.A. or by a Government Department),[26] compensation above the statutory limit is in effect to lie solely within the discretion of the government in the light of the particular circumstances of the case.

A good deal of consideration has been given recently both in Europe and in the United States to the insurance aspect of this problem. Difficulty has naturally been experienced in assessing the financial implications of the relatively unknown and far-reaching risk potential associated with nuclear reactors. The magnitude of the problem is sufficiently emphasised by pointing out that not only is there the need for cover in regard to the installation itself, which might represent about £20 to £30 million, but also the absolutely incalculable risk of third-party claims.[27] The extent of such claims in the event of a disaster might obviously be very large and it is significant that in 1957 the United States Congress passed an Act which, while imposing absolute liability upon the operators of atomic reactors, placed a limit upon such liability of $500 million in relation to any one accident.[28]

One knows, of course, that in the States everything tends to be done bigger and better than on this side of the Atlantic, and we may accept that this may apply to atomic disasters as well as to skyscrapers, Hollywood films, or television fees. Also the reference to this astronomic sum has been combined with firm official protestations that no such disaster could ever really happen, and that this arbitrary figure has been enacted purely to give the public

[24] Cll. 3 and 4.
[25] Cl. 4 (3).
[26] Cl. 8 (1).
[27] *Cf.* the *Economist*, cited n. 22, above.
[28] The so-called Anderson-Price Act (71 Stat. 576); for a discussion, see 46 *California L.R.* (1958), pp. 18–20.

confidence that funds would be available to compensate the injured in any conceivable eventuality. No one would wish to doubt the sincerity of these protestations just as all will fervently hope that they may prove well founded.

Allowing for all this, however, there remains a very remarkable discrepancy between the outside figure far more modestly contemplated by the British Government of £5 million as against the American $500 million,[29] especially as it is stated at the same time that it is not believed that there is any real danger of damage on that scale, but it is thought as well to make provision against even an improbability. Some encouragement to this effect seems to have been derived, oddly enough, from the Windscale episode where the consequential damage to third parties did not exceed about £70,000. But it will be remembered that in this instance the degree of contamination was providentially very slight and there were no ascertained injuries to persons at all. Moreover, there remains the inexplicable discrepancy that no upper limit is imposed by the new Bill on reactors run by the A.E.A. or by a Government Department but only in the private sector.

About a year and a half ago an insurance pool was formed in the London insurance market specifically to handle atomic insurance. Terms have now been settled as to the basis upon which such insurance may be granted and for the time being seem surprisingly reasonable, being more or less comparable to those charged to an ordinary chemical plant. The assumption upon which such insurance is to be worked is the possibility of third-party claims up to £10 million, that is, twice the maximum liability provided for in the new Bill. But as the *Economist* pointed out, this is in any event a purely arbitrary figure chosen for psychological reasons rather than from any hard actuarial calculation.[30]

The fact remains that an arbitrary limit, high though on present calculations it may appear, is thus imposed on liability for a major

[29] It should be emphasised, however, that the United States Act provides an upper ceiling limit for *all* reactor accidents, whereas in the English Act the limitation is confined to accidents in the *private* sector only.

[30] The *Economist*, cited n. 22, above.

disaster arising from a privately owned reactor.[31] Yet with all the reassurances and soft-soap, official and unofficial, that this can never happen, it is difficult to avoid some misgivings. Recently in Australia a man was awarded roughly £20,000 for personal injuries due to radiation. More will be said about the possible nature of such injuries later on; for the present it suffices to say that such damages in a case of this sort are far from extravagant. £20,000 divides into £5 million 250 times; in other words 250 people suffering from severe radiation injuries might absorb the whole of the insured sum, and this is to say nothing of the large-scale damage to property which would certainly result from an escape on this scale. On this basis one can detect something of the calculations on which the American ceiling of $500 million was doubtless based, and that gigantic sum appears rather less fantastic. A country can, of course, only budget for sums within its national resources, but is the sum of £5 million not on the low side? Of course if whole cities are wiped out no sums can be found capable of compensating in money for the astronomic pecuniary loss, but it does seem a serious anomaly that if (say) 500 people are killed or injured in a major rail accident full legal compensation can be recovered in regard to each of them, while if an accident on this scale occurred in relation to atomic power the injured might be left to such charitable sums as the government, perhaps aided by a Lord Mayor's Fund, might care to dispense. Admittedly there must always be an arbitrary element in any such calculation and, as I have said, a country cannot be expected to make commitments in excess of its capacity. But is £5 million really the limit of this country's capacity to make good the injury sustained by the unfortunate victims of a disaster of this kind? Since the government is already prepared to accept unlimited liability in regard to reactors run by public authorities, it seems not unreasonable that they should accept similar liability for a disaster arising from a private reactor which causes more than £5 million of damage; or if not liability without limit, then at least up to some such figure

[31] The liability under the Bill is in substitution for any other liability, *e.g.*, at common law (see cl. 3 (5)), and to the exclusion of any liability on the part of any other person than the reactor owner (cl. 3 (2)).

as £50 million. And, if the contingency is so remote that it will never happen, so much the better, and so much the less danger in the government or the insurance market committing itself to the higher figure.

Nuclear Bombers

This discussion has so far been confined to the possibility of radiation injury, and more particularly a major nuclear accident emanating from an atomic reactor. This, however, is by no means the only possible source of such a disaster. Mention here need only be made of ships, submarines and aircraft, all of which may be powered by atomic reactors, as well as the possibility of the accidental release or explosion of atomic weapons from aircraft or from ground installations. A good deal has been heard in recent months about the carrying of nuclear weapons in the course of routine military flights or patrols, and the misgivings aroused by this practice in some quarters was certainly not allayed by an incident reported in March, 1958, in which an unarmed atomic weapon was accidentally released from a B.47 bomber causing damage and injury to a small rural township in South Carolina. *The Times* reported that it was officially admitted that a small amount of radiation—not enough or of the kind "to hurt anyone"—had been discharged, and that apparently the main part of the bomb, containing uranium, had been blown to pieces.[32] A spokesman for the United States Strategic Air Command explained that the bomb had been jettisoned as a result of a "mechanical malfunction of its bomb lock system." On this *The Times* observed that this ominous phrase had sown a seed of doubt relating to the safety of unarmed devices. "For," the newspaper asked, "if the bomb release mechanism is subject to failure or misuse, may it not be that the mechanism that arms the nuclear bomb in flight could also be guilty of some malfunctioning?"[33]

An official statement by the Atomic Energy Commission and the Defence Department jointly asserted that no "fall-out" proper could result from such an accident, but as *The Times* observed,

[32] March 13, 1958.
[33] *Ibid.*

they had evidently retreated from their earlier position that crashes of aircraft carrying atomic energy could present no special danger. It was now stated that the explosion could spread the unfissioned nuclear material, which might be carried farther afield by the wind. However, the "majority" of such accidents would not create any danger of radiation, though the public would be well advised to stay clear of the area in which an accident had occurred until it had been inspected and cleared. "The statement," *The Times* added, "does not explain how the public is to know when the presence of nuclear material makes the area of an accident dangerous."[34] The *News Chronicle* directed a questionnaire at certain British Government officials and received these answers to some of the questions put:

Q. *Is there even a remote possibility that an unarmed H-bomb will completely explode?*

A. There is no danger of a nuclear explosion from an unarmed bomb in any circumstances.

Q. *Where does the danger of H-bomb mishap lie?*

A. The core of radioactive plutonium or uranium may be scattered by explosive fragmentation of the bomb, by fire, or by slow nuclear reaction or "fizzle."

Q. *What would this mean to people in the area of the crash?*

A. There might have to be local evacuation around the crash area while these radioactive materials were mopped up. Some scientists say that the area might be declared unsafe for many years.[35]

Assessing the position under the heading "If it was Plutonium," the *Economist* emphasised two points about the South Carolina incident. First, the danger would have been vastly greater had the radioactive substance been plutonium and not uranium, for "the consequences of eating or breathing as little as one microgramme of plutonium dust are alarming. Plutonium does not pass through the body, but gets absorbed like strontium or calcium into the bones and since it remains radioactive for several thousand

[34] February 15, 1958.
[35] March 13, 1958.

years, even its relatively weak radioactivity can do appalling and irreversible damage. Secondly, in this particular accident the heavy casing around the charge was not badly broken so that there was no serious escape of radioactive material. This casing, however, was not intended to be either fire or fracture proof, and there was no reason to suppose that the fact that in this instance it held was due to anything more than unusual good luck." [36]

It will therefore be apparent that it is in no sense an alarmist view in the present state of knowledge that there is at least some risk, albeit, in view of all the precautions taken, a small one, of radiation injuries and damage resulting from an accident of this kind on a fairly extensive scale. So far as this country is concerned, however, no legislation has yet been introduced to cover any such situation as has been referred to. Admittedly there are international aspects to these problems which create special difficulties and which, it is said, need further study. For the moment then the issue of liability is left to be dealt with, if it arises, at common law, which would almost certainly require specific proof of negligence to found liability. In this connection it is worth noting that the Civil Aviation Act of 1949, which makes the owner of an aircraft liable for all material loss or damage caused by it, or by a person in, or by an article falling from it, while in flight, taking off, or landing, whether to persons or property, without proof of negligence or intention, does not apply to aircraft in the service of Her Majesty.[37] The possible perils underlined by the South Carolina bomb accident make this exception even more inexplicable and unjustifiable than hitherto.

Other Sources of Radiation

Thus far attention has been drawn to what must be the most obvious possible sources of a nuclear accident of a far-reaching kind. But the ordinary lawyer, fortunately, is far more likely to have to come to grips in practice with cases of individual injuries due to the casual escape of radioactive material in isolated instances. The use of radioactive isotopes is becoming increasingly common

[36] March 15, 1958, p. 960.
[37] s. 40.

in many fields of human activity. A recent report of the British Insurers' Atomic Energy Committee gives many instances such as diagnosis and treatment in medicine, inducing mutations in plant life, the pasteurisation of food, the sterilisation of drugs, the treatment of rubber and plastics to withstand high temperatures, in thickness gauges, to test wear in bearings, boilers and other plant, examining for cracks and fractures in metal products and to detect leaks in piping.[38] There is also the problem of the disposal of waste radioactive products.

Injuries of a very terrible kind may result to persons brought into accidental contact with radioactive material in the course of any such activities or processes, and such cases though happily not yet numerous, are becoming familiar in many countries. A passing reference has already been made to a recent case in Australia. A young Dutch immigrant called Thoonen picked up an apparently harmless capsule on the floor of a power station where he was working as a rigger in December, 1955. It remained in his overall for six days before the Commonwealth Government issued an urgent warning about the missing capsule which was radioactive. The account of subsequent events is taken from the *News Chronicle* report. " Thoonen's right leg became stiff. A red patch four to five inches across began to show on his thigh, near the overall pocket. Doctors drilled holes in his chest and hip bones to obtain samples of his bone marrow. Soon a blister appeared. Then his right leg disintegrated. It had to be amputated at the thigh. There was complete death of tissue through the point of the thigh to the thighbone. Radiation also made him permanently sterile." [39] Giving judgment, Monahan J. said the doctors had been powerless to stop the deterioration which had set in in the tissues of Thoonen's leg. Doctors knew little of the effects of atomic radiation and he could regard their evidence only as informed

[38] See Report of British Insurance (Atomic Energy) Committee, referred to in 102 S.J. (1958), p. 43. Also 1957 Report of Chief Inspector of Factories, where it is stated that at the end of 1957, 400 factories in Britain were using radio-isotopes and more than 100 were operating X-ray apparatus. " New uses are discovered daily and the older ones are being expanded and more generally applied, so that the numbers of workers exposed to the hazard of ionising radiation is likely to go on increasing."

[39] March 29, 1958.

guesses. Thoonen had to face the fact that the atomic burns and their effects might appear again at any time in the next twenty years.[40]

In this case the Commonwealth admitted liability and damages of £A23,585 [£18,868] were awarded. The implications of cases of this kind are further underlined by an incident, reported from Holland in January, 1958,[41] where a four-year-old child went to a hospital in Utrecht for radium treatment for a nose complaint. Unknown to anyone, when she went home, she had embedded in her nose the tiny head of a radioactive needle. The little girl became ill but the portion of the needle in her nose apparently dropped out unawares, and must have been swept up when the room was cleaned. The sweepings were burnt in the stove and the ashes later dumped in the garden. Following these events the child became dangerously ill and her whole family of seven were taken for observation in strict isolation in hospital, a barbed wire fence placed round the house, the garden covered with plastic sheets to keep off birds or cats which might scatter radioactive dust, and armed police were placed on guard outside day and night. Also the infants' school which the child attended was temporarily closed and, as last reported in the English press, fears were expressed that the house might have to be demolished.[42]

If a mere pinhead of radioactive matter, which has gone astray, can thus spread havoc, injury and damage, it is hardly surprising that a second look is being taken at even such long-established contrivances as X-ray machines. A very curious example has recently been in the news in the form of the familiar X-ray machines used to assist in fitting footwear in shoe shops. The *Economist* commented in June, 1958, that no one will ever accuse the government of over-hasty action in this matter.[43] For it was two years previously that the Medical Research Council, when asked to consider the effect of bomb tests, had provided "the disconcerting answer that far more radiation had been added to the world by the slap-happy use of X-ray machines than all the bombs

[40] *The Times*, March 29, 1958.
[41] *The Times*, January 20, 1958.
[42] *Ibid.*
[43] June 7, 1958, p. 923.

put together," and instanced in particular the routine use of X-rays in hospitals for diagnosis, and by shops for fitting shoes.

In June, 1958, the Home Office finally got round to putting out regulations controlling the use of these machines in shoe shops, and very oddly these read. A maximum is now, somewhat belatedly, laid down, and timing devices are to be installed cutting off the rays after five seconds. A warning notice over the machine is to advise customers to put their feet under this machine no more than twelve times in any one year. This limit alone indicates the extreme reserve with which such machines should be regarded and it seems strange that their use has not been prohibited save for orthopaedic reasons and under proper control, as the Medical Council suggested. Certainly most people who have visited shoe shops have in the past seen children frequently playing with these machines as if they were toys, and naturally without arousing any concern at all.

The Nature of Radiation Injury

How then is the law to tackle these novel and incalculable sources of human injury? The problems are numerous and difficult, and some in particular are created by the inadequacy of present medical knowledge as to the full nature and extent of the consequences of radiation injuries.[44] This gives rise to many complications in the field of damages. For instance, the general way in which the effect of radiation on the human frame may be pictured is after this fashion. There is a good deal of natural radiation present in the world and human beings are capable of withstanding a certain maximum dosage of radiation in the course of a lifetime without harmful results. But radiation effects are cumulative, so that one can regard each individual as having, so to speak, a deposit in the radiation bank capable of being drawn upon from time to time, but when that deposit is exhausted nature makes no provision for an overdraft. It is a little like Balzac's *Peau de Chagrin*, save that in the story the extinction of the skin led to the immediate death of the owner, whereas exceeding the permitted dose of radiation

[44] See, *e.g.*, the somewhat inconclusive report of the United Nations Scientific Committee on the Effects of Atomic Radiation (published August 10, 1958).

(unless the excess is very large) may result, no doubt ultimately in death, but only by the route of dread diseases such as leukaemia or cancer of the bones.

Suppose, then, as a result of accidental exposure a substantial fraction of a person's deposit is used up at one go. There may be no immediate effects visible or ascertainable at all, and yet in many years' time he may suffer severe disease quite conceivably attributable to the excess dosage he had previously sustained. Yet the victim is in a serious dilemma from the point of view of seeking a legal remedy. If he brings his action right away his damage would be of so speculative a character as to be virtually incapable of being quantified by a court. A judgment recovered by him would nevertheless bar any future claim for further resulting injury. If, however, he were to wait until concrete signs of material injury emerged he would be in this difficulty. On the one hand, there is the danger of his claim being statute-barred, for the harmful consequences might not emerge for as long as twenty years after the accident. Medical opinion is generally in agreement that in such cases the harm is initiated at the moment of impact of the radiation,[44a] whereby certain physiological changes are brought about which may or may not finally result in some manifest diseased condition. The cause of action would therefore seem to arise at the time of the accident,[45] so that the time for bringing the action (now reduced by the Limitation Act, 1954, from the former period of six to only three years) would begin to run from the moment that the individual received the impact of the radiation. On the other hand, if he waits some years to bring his action until a visible condition has arisen, there may exist a serious difficulty of proof. For though the disease may be attributable to the accident in theory it will probably be a condition which occurs in a certain proportion of human beings quite independently of radiation injuries, and who is to say, after a lapse of some years, as a matter of medical causation in the light of present medical knowledge, that the accident and the disease are causally related?

44a There is, however, the distinct problem of a person injured by gradual exposure to atomic radiation.

45 *Cf. Archer* v. *Catton, Ltd.* [1954] 1 W.L.R. 775.

Admittedly, somewhat similar problems do arise in other fields of medicine; for instance, in the case of head injuries which appear not to have affected the brain but where the prognosis cannot be given with complete certainty. But the field of radiation injuries differs from these substantially in degree if not in kind by reason of the highly intangible and speculative nature of the possible consequences, and by the extreme severity with which these may ultimately manifest themselves. This is to say nothing of the still more mysterious and controversial genetic effects which are generally believed to be liable to result from excessive radiation, thereby transmitting a damaged heredity to the offspring of the victim who may personally escape any visible or physical consequences to himself. This form of damage is probably too intangible and uncertain for legal remedy at present, quite apart from the difficulty of deciding whether to confer a right of action on the progenitor himself or on the offspring ultimately born in a congenitally defective state.[46]

As to the other matters to which reference has been made, an amendment to the Statute of Limitations is already proposed by the new Bill, in the cases to which it applies. As originally introduced, the Bill proposed to allow claims to be brought within ten years from the date when the radiation occurred. As a result of criticism based on the established long-term effects of radiation, this provision has since been amended to cover a period of thirty years, though subject to the qualification that no claim presented against a privately owned reactor after ten years[47] is to be paid unless or until Parliament decides how the reactor owner is to be reimbursed. Also it is to be observed that in any event this extension of the usual limitation period does not apply to radiation injuries resulting in other ways than from a nuclear plant. Might it not be desirable, therefore, to make a general amendment of the law in all radiation cases either by allowing an extension of the period, or permitting a court to keep the cause of action alive by a declaration of liability,[48] or by allowing subsequent actions in regard to

[46] *Cf. Walker* v. *G. N. Ry. of Ireland* (1890) 28 L.R.(Ir.) 69.
[47] The thirty-year period is to be extended to reactors owned by the A.E.A. or run by a Government Department, but without the qualification mentioned (see cl. 8).
[48] *Cf. Hordern-Richmond* v. *Duncan* [1947] K.B. 545.

further damage as it arises? Clearly, any such provisions would call for very careful consideration as to their proper scope and extent, and the problem of proof would still remain. Also, where liability is admitted it may prove possible in some cases to reach an agreed settlement on the lines which I understand has been done in several cases where the Treasury Solicitor has been concerned in claims by workmen against the Crown. The procedure adopted has been to have an agreement providing for immediate payment of an agreed sum as damages, with provision for payment of additional sums in certain stipulated contingencies, if happening within a specified period.

Strict Liability: Incidence, Extent and Limits

Within the allotted space, it is possible only to touch very lightly on some of the problems which must beset the lawyer and the legislator in this field. It has already been pointed out that to establish liability at common law for radiation injuries there would generally have to be proof of negligence. In some instances perhaps the plaintiff might be assisted in the burden of proof by the maxim *res ipsa loquitur*, but despite this, it still seems very arguable that all escapes of radiation should be subject to a strict duty on the lines of the Atomic Energy Authority Act. For not only might this tend to create higher standards of security precautions, but it also hardly seems fair to cast the risk of accident on the innocent victim, and those responsible for controlling radioactive material are certainly better able to insure against the consequences of accident, avoidable or otherwise.

Yet here again great care would have to be given in considering upon whom this duty is to be cast and its extent. Many people may have occasion to handle or deal with radioactive material purely incidentally, as, for instance, in the case of delivery by a carrier. But to impose strict liability on a carrier might make him liable, even though he had no knowledge and no means of knowing in a particular case, that he was handling such material.[49] Again

[49] The Nuclear Installations Bill extends strict liability, both to the A.E.A. and to private operators of reactors, in the case of radiation occurring in the course of carriage between places in the United Kingdom in connection with the use of

it may not be thought desirable to impose liability of this kind upon individual workmen, or on doctors, nurses or other hospital staff employing radioactive material. An attempt might therefore have to be made to define rather strictly the classes of persons on whom such a duty is to be cast, and this would plainly be less easy than in the relatively straightforward case of atomic reactors. To take another topical illustration, what of a person injured by excessive exposure to an X-ray machine in a shoe shop? Under existing law, negligence would have to be established, which would generally be impracticable under present conditions. Should strict liability be imposed and if so, on whom; on the owner of the shop, the manufacturer of the machine or perhaps the Home Office?

And what of the extent of the liability? Is it to be subject to any defences such as act of God, inevitable accident or the intervening act of a third party? At any rate contributory negligence would presumably be admissible in reduction of the damages. And different classes of persons need to be considered from the point of view of a potential victim. Suppose, for instance, that the plaintiff, in the Australian case which has been mentioned, was technically a trespasser either in relation to the place where the capsule was picked up or in relation to the offending capsule itself? What should be said, too, of the scientists engaged in work connected with radiation with full knowledge of its hazards, actual and potential? Ought they to be met with the plea *volenti non fit injuria* when suffering injury by an escape of radiation? Of course, in a case to which the Atomic Energy Act of 1954 applies this will not afford a defence to the owner of an atomic reactor, but should the position not be the same in other cases, for instance, that of a scientific worker in a chemical research laboratory?

The Windscale misadventure drew attention to the dangers of contamination of property from radiation, such as milk, water, grass or cattle. Such contamination will almost inevitably result in claims for consequential damage, such as loss of profit through

the reactor in question: see cll. 3 (1) (*b*) and 8 (2). But no liability is imposed upon the carrier himself; indeed, in the case of privately owned reactors and those run by Government Departments, the liability of anyone but the operator of the reactor is expressly excluded in any case of radiation to which the Bill applies (cll. 3 (2) and 8 (1)).

diminished sales. It is understood that the London insurance pool for atomic energy contemplate covering at least some forms of consequential damage,[50] but many aspects of this question are likely to arise under the general law. For instance, a reported escape of radiation, even if it does not materially contaminate local food supplies, may quite reasonably lead to fear of contamination until full tests show this to be unjustifiable. Thus, in Carlisle it was reported that five days after the Windscale mishap milk sales had dropped by 15 per cent. Again, fear of contamination or possible sterility may affect the value of local cattle.[51] No doubt such difficult questions as to remoteness of damage can best be left to be resolved by the courts as they arise and some of these problems may be common to other and more familiar types of hazard, though there is little in the way of authoritative guidance to be found in the English cases. Anyone who remembers the Croydon typhoid outbreak in 1938 may recall that as a result of rumours (subsequently falsified) that watercress was the source of the epidemic, there was a heavy fall in sales of that article and severe losses were sustained by the growers. The test action that was fought against the Croydon Corporation[52] did not, however, raise any issue as to indirect or consequential liability of this kind. It does seem, nevertheless, that the hazard of radiation may raise issues of this sort in the field of consequential damage in a more acute form than hitherto.

Disraeli once remarked that the worst evil one has to endure is the anticipation of the calamities that do not happen. One may perhaps feel that much of what has been examined in this paper is of this character. For all that, it may be wiser to think out our attitude to these grave problems at a time when they can be appraised in a calm and unemotional atmosphere, rather than await the spur of some dire catastrophe to dictate an extemporised solution.

[50] See 102 S.J. (1958), p. 43.
[51] *Cf.* 225 L.T. (1958), p. 330.
[52] *Read* v. *Croydon Corporation* [1938] 4 All E.R. 631.

SAFETY OF TOOLS AND EMPLOYER'S LIABILITY

G. J. Webber

The decision of the House of Lords in *Davie* v. *New Merton Board Mills, Ltd.*[1] is, for several reasons, of unusual significance.

"Far-Reaching Consequence"

First, "a question of far-reaching consequence" has now received a decisive and unanimous answer. An employer who buys a tool for the use of his employees from a reputable supplier who, in turn, has bought it from a reputable manufacturer is not responsible for an injury caused by a latent defect that he could not have discovered. He has discharged his "duty of taking reasonable care to provide proper appliances." Jenkins L.J., in the Court of Appeal, had delivered a powerfully reasoned judgment of dissent, not only basing himself upon what he took to be the law as deducible from the authorities, but no less convinced of "the merits of this conclusion." It would, he thought, be "an irrational and intolerable refinement to distinguish for this purpose between tools made by a manufacturer to the order of the employer and tools bought by the employer ready made."[2]

Judicial Re-interpretation

Secondly, the judicial process by which this decision was reached is of profound interest. Ultimately, it involved the judicial interpretation—or the re-interpretation—of certain weighty and widely stated observations on the obligations of an employer, made by Lord Wright and Lord Maugham in *Wilsons'* case in 1938.[3] Moreover, quite a number of Scottish authorities—one decision in 1898,

[1] [1959] 2 W.L.R. 331. Viscount Simonds, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Keith of Avonholm.
[2] [1958] 1 Q.B. 210, 217–237, at p. 237.
[3] *Wilsons & Clyde Coal Co., Ltd.* v. *English* [1938] A.C. 57, 78–81, 87–88.

the other as recent as 1953[4]—and dicta going back a century, pointed to the view that by the law of Scotland (with which, in this branch, English law is in harmony) a master's duty to use due care in providing sufficient plant was not satisfied by obtaining it from a merchant or manufacturer of good repute.[5] The speech of Lord Reid in particular, which contains a detailed and a critical re-examination of the English and Scottish cases is, if one may say so, a superb study in judicial re-interpretation. And Viscount Simonds formulates the fundamental question in such incisive and disarmingly simple terms that the answer—as might be expected—would appear to be inherent in the very formulation:

> "Remembering, my Lords, that the essence of the tort of negligence lies in the failure to take reasonable care, I am constrained to wonder how this thing can be."[6]

Dr. Goodhart's Article

There is a third reason which imparts no small interest to the decision. In the July number of the *Law Quarterly Review* for 1958, there appeared a powerful and closely reasoned essay (written when leave to appeal to the House of Lords had been granted) by Dr. A. L. Goodhart, the learned Editor, entitled, "A Master's Liability for Defective Tools."[7] After carefully weighing the arguments and the three possible grounds on which a personal duty might be ascribed to the employer to guarantee no negligence in the manufacture of tools by a third person ("a new and hybrid form of liability")—namely, the grounds of reason, precedent and comity (the Scottish case)—Dr. Goodhart concludes:

> "The fact that the doctrine of common employment has been abolished and that the workman can now recover direct from the negligent manufacturer under the rule in *Donoghue* v. *Stevenson*[8] may, as Parker L.J. has pointed out,[9] make the

[4] *Macdonald* v. *Andrew Wyllie & Son* (1898) 1 F. 339; *Donnelly* v. *Glasgow Corporation*, 1953 S.C. 107.
[5] Glegg on *Reparation* (4th ed.), p. 384.
[6] [1959] 2 W.L.R. at p. 335.
[7] 74 L.Q.R. (1958), pp. 397–406.
[8] [1932] A.C. 562.
[9] [1958] 1 Q.B. at p. 244.

courts more reluctant to extend the master's personal duty of care in such an unusual manner." [10]

The *Davie* appeal was heard in November, 1958, and in their speeches delivered in January, 1959, the House unanimously rejected this extension of the master's duty of care.

> "The claim was against reason, contrary to principle and barely supported by authority," Viscount Simonds declares in summing up.[11]

Although the article is not referred to in the speeches, the views expressed by the House on the argument of reason, the meaning of the difficult dicta in *Wilsons'* case and the relevance of the Scottish case, are in harmony with the submissions of Dr. Goodhart. Moreover, the article had drawn attention to the analogy of the *Angliss* decision [12] and the judgment of Wright J. strongly relied upon in the House, that a shipowner is not liable for the bad workmanship undiscoverable by him of the shipbuilder's employees. In this context there comes to mind the case of *Gold* v. *Essex County Council*,[13] where the Court of Appeal explicitly agreed with the view expressed in an article in the *Law Quarterly Review* a few years before, that the interpretation of a leading case was incorrect.[14]

Social Policy

For yet a fourth reason, which is mentioned by Dr. Goodhart—"the standpoint of social policy"—the *Davie* decision is significant.

The point is adumbrated by Viscount Simonds at the end of his speech. It had been "discreetly suggested," he says, that the House should consider the fact that "possibly or even probably, the employer would, but the workman would not, be covered by insurance, and for that reason, should be the more ready to fasten

[10] 74 L.Q.R. (1958), at p. 406. Prof. C. J. Hamson has written to similar effect: *Cambridge Law Journal* (1958), p. 27.
[11] [1959] 2 W.L.R. at p. 343.
[12] *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *Peninsular & Oriental Steam Navigation Co.* [1927] 2 K.B. 456, 460.
[13] [1942] 2 K.B. 293, where the Council was held liable for the negligence of a radiographer employed under contract at one of its hospitals.
[14] "Hospitals and Trained Nurses," 54 L.Q.R. (1938), 553.

upon the employer liability for an accident due neither to his nor to the workman's carelessness." [15]

The "insurance idea" has found favour with several recent writers, and the view that those able to pass on the loss to the public by higher prices, should bear that loss.[16] Indeed, the realm of insurance is rapidly extending its boundaries. The employer, it has been said, is "the most suitable channel for passing on the loss through liability insurance and higher prices." [17] And again: "The damages for breach of the employer's 'personal' duty will be met by the employer's insurance company, the premium forming part of business overheads and the fault (if any) of the employer may be reflected in the future term of the insurance policy. At the same time, the individual solely or principally at fault may be reached through third-party proceedings in tort." [18] "Social security" would thus be combined with "individual responsibility for individual fault."

Such a "scheme of things," however—and the complex mechanics of modern industrial life appear to be steadily moving in that direction—will not come except through legislation. It is too much to hope that it will arrive by the side wind of a leading case. Instancing the Factories Acts and the elaborate statutory regulations, "it is not the function of a court of law," said Viscount Simonds, "to fasten upon the fortuitous circumstances of insurance to impose a greater burden on the employer than would otherwise lie upon him." [19]

The Facts in the Davie Case

The facts in the *Davie* case are short and simple. Davie was a maintenance fitter employed by the New Merton Board Mills, Ltd. In March, 1953, he was using a "drift"—a wedge-shaped bar of metal—in the course of his work, to separate certain parts of a machine. As he struck the tool with a hammer, a chip flew off

[15] [1959] 2 W.L.R. at p. 342.
[16] See Salmond, *Law of Torts* (1957, 12th ed.), pp. 22, 23, and the footnotes for the references and criticisms of the idea.
[17] Fleming, *The Law of Torts* (1957), p. 354.
[18] C. Grünfeld, "Employer Responsibility for Safe Tools," 21 M.L.R. (1958), p. 309, at p. 310.
[19] [1959] 2 W.L.R. at p. 243.

into his left eye and the sight of that eye was destroyed. The tool had been made in Sheffield in 1946 by Frank Guylee & Son, Ltd., an old-established firm of tool-makers, and the same year had been sold by them to reputable suppliers named Baldwins who, soon after, sold a quantity to the employers, including the "fatal drift" which remained unused until 1953. The steel was excessively hard and liable to fracture when struck on the head with a hammer and the defect ought to have been discovered by the manufacturers. The employers did not examine the tool nor could they have been reasonably expected to examine it. Nothing short of a test would have revealed to them the latent danger.

Ashworth J. held that employers, as well as manufacturers, were liable and he awarded Davie £2,030 damages, but directed that the employers should have a full indemnity against the manufacturers.[20]

This judgment, the Court of Appeal by a majority (Parker and Pearce L.JJ., Jenkins L.J. dissenting) reversed.[21] The majority held that the employers, in buying from a reputable dealer a tool containing a latent defect which they had no means of discovering, had fulfilled their duty to their employee, namely, to take reasonable care to provide a reasonably safe tool. The dealer was neither the servant nor agent nor independent contractor of the employer. Jenkins L.J. took the view upon the English and Scottish authorities that the employer could not perform that duty by relying on the care and skill of others. If *they* were negligent, *he* was liable.[22]

After a five-day hearing and a critical re-examination of over a score of English and Scottish cases, the House of Lords unanimously affirmed the decision of the Court of Appeal.[23]

The Problem

The problem is fundamental and far reaching: the meaning and the extent of the employer's duty of reasonable care.

A decision holding the employer liable for the results of his manufacturer's negligence (of which he was unaware and could not

[20] [1957] 2 Q.B. 368.
[21] [1958] 1 Q.B. 210.
[22] [1958] 1 Q.B. 217–237, at p. 236.
[23] [1959] 2 W.L.R. 331.

reasonably have been aware) would have imposed on him, in effect—it might be thought—the duty of warranting the safety of the tools.[24] The employer, having no control over the process of manufacture, might thus become responsible for the negligence of "some person somewhere in the chain," beginning, even before the manufacturers, with "the person who supplied parts or materials to the manufacturer who, in turn, incorporated them in the article sold to the employer." [25]

On the other hand, an employer has no control over an independent contractor for whom he may be liable and an employee may well reason: "Whether you had the tool made to your order or bought it ready made from a manufacturer or a supplier is to me, all one. I had no voice in selecting it, nor could I choose the manufacturers or the suppliers. The tool is yours. It was negligently made. I have been injured. The responsibility should be yours."

In 1955 for the first time, the problem came before the English courts. Finnemore J., in a case heard at the Chester Assizes on similar facts, *Mason* v. *Williams & Williams, Ltd.*,[26] held, "unhampered by the citation of authority and in the light of common sense and the application of the common law as he understood it," that an employer who bought tools from a reputable supplier was entitled to assume they would be fit for the purpose. Not until the *Davie* case, two years later, did the question come before the Court of Appeal and the House of Lords. Yet in Scotland it was not new and was well recognised as far back as 1898. *Wilsons'* case itself came on appeal from Scotland—upon the employer's "personal" duty to take reasonable care for the safety of his employees and his liability for the negligence of his servants or agents. In 1953 in *Donnelly* v. *Glasgow Corporation* [27] the Court of Session held the employers liable for the negligence of the manufacturer.

It is in the extent of this "personal duty" that the *Davie* decision has now drawn a line excluding the employer's liability

[24] Thus, Viscount Simonds [1959] 2 W.L.R. at p. 335, Lord Keith of Avonholm at p. 365, and Lord Morton of Henryton at p. 345.
[25] *Per* Lord Reid at p. 346.
[26] [1955] 1 W.L.R. 549.
[27] 1953 S.C. 107.

for the acts of a person to whom he has not "entrusted" or "delegated" his own duty (including an "independent contractor")—a person such as a manufacturer, "provided that he has been careful to deal with a seller of repute and has made any inspection which a reasonable employer would make." [28]

"By what use or misuse of language," asks Viscount Simonds, "can the manufacturer be said to be a person to whom the employer delegated a duty which it was for him to perform?"

On the other hand, Lord Reid is careful to point out that between the liability for the negligence of an independent contractor to whom an employer has delegated a "personal duty" and the non-liability for the negligence of a reputable manufacturer, there is "a wide sphere regarding which it is unnecessary, and it would, I think, be undesirable to exercise any opinion here. Various criteria have been suggested and it must be left for the further development of the law to determine which is correct." [29]

The problem thus formulated, how was the solution judicially achieved? How did Lord Reid succeed in overruling what appeared to be the *jurisprudence* of Scottish opinion for sixty years? And by what process were the weighty dicta of Lord Wright—whose eminence continues to dominate modern common law—in *Wilsons'* case,[30] that appeared to point to an "absolute responsibility" resting upon the employer to use due care and skill, a "personal duty" to be performed *per se* or *per alios*—by what process were those dicta upon which Jenkins L.J. so greatly relied,[31] reconciled with the general principle propounded by Lord Herschell in *Smith* v. *Baker* [32] that a master's duty is the duty "of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk"?

There were dicta, too, of Lord Maugham that even more clearly appeared to point to an "absolute obligation." [33]

[28] *Per* Lord Reid [1959] 2 W.L.R. at p. 359.
[29] *Ibid.*, at pp. 359–360.
[30] [1938] A.C. 57, 78, 80, 81.
[31] [1958] 1 Q.B. at pp. 220, 221, 223–224, and at p. 231.
[32] [1891] A.C. 325, 362.
[33] [1938] A.C. at pp. 87, 88.

The Scottish Cases

No less than seventeen Scottish authorities were relied upon, beginning with *Baird* v. *Addie*,[34] decided in 1854, to which Lord Reid attached "some importance," before the rule of common employment became part of the law of Scotland in 1858.[35] Mine owners contracted with a person not their servant to ventilate the mine. A miner was injured by an explosion due to defective ventilation. The employers were held liable. They had contracted out their "primary obligation" to another for whose neglect they were therefore liable. After the rule of common employment became the law, another basis for the employer's liability had to be found—"the idea of duties personal to the employer." Since that rule has been abolished, says Lord Reid, one should have in mind, as far as one is unfettered by authority, "the older and less artificial line of development." [36]

Here it may be pertinent to cite from an illuminating note upon a case before the Supreme Court of Canada in 1942, *Marshment* v. *Borgstrom* [37]:

> "Ironically enough, to combat a defence of common employment which earlier courts had found was a 'term' of the contract of employment, . . . the House of Lords found this new obligation [*sc.*, the "personal" duty] in the contract of employment also—which, to say the least, would have shocked the courts which found the first implied term."

But to return to Lord Reid's examination of the Scottish authorities. He passes to the opinions of Lord President Inglis, who in *Ovington* v. *McVicar* [38] had said:

> "A defect of machinery, latent and unknown to the master of a work, which he neither knows nor is bound to know, is not sufficient to ground a claim for damages at the instance of a workman or his relatives. I think there must be some

[34] (1854) 16 D. 490.
[35] *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq.H.L. 266.
[36] [1959] 2 W.L.R. at p. 352.
[37] [1942] 4 D.L.R. 1, and see at p. 10, *per* Kirwin J.
[38] (1864) 2 M.(Ct.of Sess.) 1066, 1072, 1073.

> *culpa* on the part of the master before he can be made answerable for injuries sustained by the workman."

On the other hand, he declared in *Wilson* v. *Merry & Cunningham* [39]:

> " . . . wherever the master of a coal-pit, or of any other work, has occasion to purchase and provide a machine or apparatus to be used by his workpeople, he is liable for the insufficiency of that machine or apparatus if it should turn out to be insufficient."

The manager of a mine negligently had a scaffold erected across a shaft, impeding ventilation. The providing of defective apparatus was alleged. This was not such a case, the Lord President said, of providing a machine or apparatus; there was no latent defect, the defect was obvious. The passage is explained by Lord Reid to be " a passing reference to the law applicable in a state of affairs different from that in the case before him." [40]

The Case of the Scaffolding

Macdonald v. *Andrew Wyllie & Son* (1898),[41] Lord Reid conceded, afforded " some support " to the appellant. A scaffold, erected by a firm of joiners employed by builders under contract to take down high walls, was defective. It collapsed after it was taken over by the builders and one of the builders' workmen was injured. The defect was discoverable on inspection by a skilled person. The jury was directed that if the builders, not themselves skilled in scaffolding, selected an experienced tradesman to erect the scaffold, they should not be liable if it fell through their unskilfulness in erecting. This direction, the Court of Session held, was wrong in law.

The arguments in this case, it is interesting to note, recur in the *Davie* appeal. Furthermore, it was argued that whether the master made the appliances himself or procured them from others, if they

[39] (1867) 5 M. 807, 811.
[40] [1959] 2 W.L.R. at p. 353—see the dictum similarly explained *per* Lord Keith of Avonholm, *ibid.*, at p. 363.
[41] (1898) 1 F.(Ct.of Sess.) 339.

were defective, unless the defect were latent, he was liable. The builders contended that a master would be liable only if he neglected some reasonable precaution to secure the safety of the plant. He was entitled to assume that appliances or tools made for him by competent workmen were sound and sufficient for the purpose. For the negligence of his contractors he was not liable, for they were not his servants or agents.

Lord Young instanced a person who had erected a scaffold for people to see a procession: it would be no answer by a person who had taken a seat and was injured by a defect in it, to say that a competent contractor had erected the scaffolding.[42]

Lord Trayner was more explicit. As between employer and workman, he said, the scaffolding was the employer's: the workman was not concerned with the erector:

> "If a master buys a machine, let us say, necessary for the execution of his work, and gives it to the workman, it is the master's machine, not the workman's or the manufacturer's. If the machine turns out to be faulty, defective or otherwise insufficient, the master must answer for it. He may have his relief against the maker or manufacturer." [43]

This, in a nutshell, was the case for *Davie* that commended itself to Ashworth J. and to Jenkins L.J.

"When the scaffolding or the machine," Lord Trayner continued, "passes out of the hands of the man who erected or made it"—this appears to refer either to an independent contractor (as here), or to a manufacturer—"it becomes the scaffolding or the machine of the man who ordered it and gave it to his workman. It is the master's scaffolding or machine, although erected or made *per alium*, and he is directly responsible for its insufficiency." [44]

Lord Moncrieff, however, with whom Lord Macdonald agreed, took the view that to make the employer liable, there must be "proof of fault or negligence on his part or those for whom he is responsible." [45] To entrust the performance or construction to a

[42] *Ibid.*, at p. 344.
[43] *Ibid.*, at p. 345.
[44] *Ibid.*
[45] *Ibid.*, at p. 347.

skilled tradesman would go far to establish reasonable care but it would not carry him the whole way if, on inspection, he could have discovered the defect.

Lord Reid also refers to a dictum of Lord Dunedin saying that since *Weems* v. *Mathieson*[46] it had always been considered clear law that "it is not enough for the workman to say that the employer *de facto* supplied insufficient material or an insufficient machine. He must show that in doing so he was guilty of some negligence."[47] Again, in *Ballard* v. *North British Ry.*,[48] occurrence of an accident arising out of the use by a servant of plant in the course of his employment may be a fact from which you may infer it was defective "and it will then be upon the employer to show that the defect was one against which he could not have guarded."

The Case of the Omnibus

"Until the recent case of *Donnelly* v. *Glasgow Corporation*,"[49] said Lord Reid, there was no decision making an employer liable merely because his plant had a latent defect (*sc.*, a defect latent to him), or for the negligence of someone other than his servant or subordinate. Moreover, apart from Lord Trayner and possibly, Lord Young, he continues: "I have found no expression of opinion which appears to me to go beyond that."[50] Lord Reid must be referring to the cases, for, as Lord Keith points out in his opinion, Glegg on *Reparation* (since the 2nd edition in 1903) states that the master's duty to use due care in providing sufficient plant "is not satisfied by obtaining it from a merchant or manufacturer of good repute."[51] Lord Keith accepts Lord Reid's view of the Scottish cases and regards the passage in Glegg as wrong.

In *Donnelly* v. *Glasgow Corporation* an omnibus, through a breakage in a front road spring, overturned. The driver and conductor sued their employers for damages for injuries. The corporation, admitting the defect, averred by their pleading that,

[46] (1861) 4 Macq.H.L. 215.
[47] *R. T. Wood & Co.* v. *Mackay* (1906) F.(Ct.of Sess.) 625, 633–634.
[48] 1923 S.C.(H.L.) 43, 53.
[49] 1953 S.C. 107; S.L.T. 161; followed in *McElhinney* v. *Pressed Steel Co., Ltd.*, 1958 S.L.T.(Sh.Ct.) 35, where the facts were similar to those in the *Davie* case.
[50] [1959] 1 W.L.R. at p. 355. [51] 4th ed., at p. 384, cited *ibid.*, at p. 363.

having bought the chassis from reputable manufacturers, they were not liable for latent defects in design: this was the manufacturer's responsibility. The court held the defence irrelevant: the employers could not escape liability to their servants by blaming the manufacturers.[52]

The Lord Justice-Clerk (Lord Thomson)—Lord Mackay and Lord Patrick concurring—said:

> "But on this branch of the law a master cannot escape liability to his servant for defective plant by blaming his agents. The personal responsibility which the law lays on the master in respect of plant covers the activities of any person whom the master employs to provide that plant. The supplier and the master are as one. If then the supplier erred, the master is saddled with the results of that error." [53]

Had the defect been reasonably undiscoverable by the corporation *and their suppliers*, the defence would have been relevant. The defect being patent to their suppliers, "that in this branch of the law means that it was patent to them."

Upon this case Lord Reid simply observes that the Second Division was accepting a prevalent view of the effect of *Wilsons'* case,[54] a view which the House now knew to be wrong and which could not stand with Lord President Inglis' words in *Ovington* v. *McVicar* in 1864:

> "I think there must be some *culpa* on the part of the master. . . ." [55]

The re-interpretation is complete.

The Master's Duty

It is time to turn back to first principles as stated in *Smith* v. *Charles Baker & Sons*[56] and then to see how they were later

[52] Intermediate examination to see whether there were adequate safety devices, was contemplated. See *per* Lord Mackintosh (Second Division), *ibid.*, at p. 115.

Thus, the manufacturers would not be liable under the *Donoghue* decision as explained by Goddard L.J. in *Paine* v. *Colne Valley Electric Supply Co.* [1938] 4 All E.R. 803.

[53] 1953 S.C. at p. 122; S.L.T. at p. 168.

[54] [1938] A.C. 57.

[55] (1864) 2 M. 1066, 1072, 1073.

[56] [1891] A.C. 325, 362. See William L. Prosser, *Law of Torts* (1955), Chap. 13, Employer's Liability, pp. 373–375.

interpreted in *Wilsons'* case [57] by Lord Wright and Lord Maugham. The master's duty at common law, said Lord Herschell, is "the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk." [58] Upon that formulation all are agreed. The words, says Viscount Simonds, are important, "both in prescribing the positive obligation and in negativing by implication anything higher." [59]

But for whom is the employer responsible?

First, for his own acts and next, for the acts of his servants. What of his agents? What of his "independent contractors"? A manufacturer who, making a tool, supplies it to a merchant who sells it to the employer, is not an "agent" of the employer. Is he, asks Viscount Simonds, "a manufacturer with whom he never contracted, of whom he may never have heard and from whom he may be divided in time and space by decades and continents," [60]—is he an "independent contractor"?

This superb characterisation is, incidentally, a perfect description of the modern manufacturer, who, upon the *Donoghue* rule may, nevertheless, be liable to the ultimate consumer!

The powerful dissent of Jenkins L.J., it is clear, does rest, to a great extent, upon the exposition of Lord Wright and Lord Maugham in *Wilsons'* case [61] and it was accordingly to the true meaning of those dicta that the House of Lords felt bound to turn the searchlight of its power of ultimate interpretation.

Wilsons' Case

In *Wilsons'* case the House held that if a mine owner appointed an "agent" to perform his (*sc.*, the owner's) obligation of providing a safe system of working, the mine owner remained vicariously responsible for the negligence of the agent. At the hearing in the Court of Session Lord Normand (Lord President) referred with approval to a passage in the judgment of Lord

[57] [1938] A.C. 57.
[58] [1891] A.C. 325, 362.
[59] [1959] 2 W.L.R. at p. 337.
[60] *Ibid.*
[61] [1938] A.C. 57, 78, 87, 88.

Aitchison in *Bain* v. *Fife Coal Co., Ltd.*[62] There were certain duties, the Lord Justice-Clerk had said, owed by a master to his servant "so imperative and vital to satisfy that the master cannot divest himself of responsibility by entrusting their performance to others so as to avoid liability in the event of injury arising to the servant through neglect of any of these duties." With this passage Lord Normand agreed, "subject to the explanation which is to be gathered from the context, that, when delegation to others is spoken of, it is delegation to servants that is meant." [63]

It is true that in neither of those cases did any question arise as to the effect of "delegation" to someone who was not a servant or agent of the employer. This fact was present to the mind of Jenkins L.J., but he regarded the *ratio decidendi* of that case as equally applicable to the facts in the *Davie* case.[64]

Lord Wright: "Absolute Responsibility"

Lord Wright, referring to "those fundamental obligations of a contract of employment . . . for the performance of which employers are responsible," continued:

> "When I use the word 'absolutely,' I do not mean that employers warrant the adequacy of plant, or the competence of fellow-employees, or the propriety of system of work. The obligation is fulfilled by the exercise of due care and skill. But it is not fulfilled by entrusting its fulfilment to employees even though selected with due care and skill." [65]

The employer's obligation, he later declared, is "personal to the employer and one to be performed by the employer *per se* or *per alios*." [66] An analogy of a similar personal obligation Lord Wright took from the Carriage of Goods by Sea Act, 1924, requiring a shipowner to take reasonable care to provide a seaworthy ship:

> "So far as I know it has never been claimed that the obligation is fulfilled by the shipowner taking reasonable care

[62] 1935 S.C. 681, 687–694, at p. 693.
[63] 1936 S.C. 883, at p. 901.
[64] [1958] 1 Q.B. at p. 220.
[65] [1938] A.C. at p. 78.
[66] *Ibid.*, at p. 80.

> to appoint a competent expert; the shipowner is absolutely held to the fulfilment of the obligation. It is the obligation which is personal to him, and not the performance." [67]

Dr. Goodhart, in the *Law Quarterly Review* article,[68] cited from the judgment of Wright J. (as he then was) in the *Angliss* case decided in 1927,[69] and not referred to in *Wilsons'* case. This decision, which appears to run counter to the above analogy, was relied upon by the respondents and is adopted in the speeches of Viscount Simonds and Lord Reid to show that Lord Wright's speech does not support the wider inference. Viscount Simonds indeed, declares that the "analogy" was given "with an imperfect recollection of what he himself had decided in the earlier case." [70]

In the *Angliss* case, construing the relevant article of the Schedule to the Carriage of Goods by Sea Act, 1924, Wright J. had held that the carriers were not liable for meat which had been contaminated on ship owing to bad riveting by the builder's employees, a defect which the carriers could not have discovered.[71] Similarly, says Viscount Simonds, the employer should not be liable for the bad workmanship, equally undiscoverable by him, of the manufacturer who, at second hand, supplied the tools.[72]

Lord Reid, examining the *Angliss* judgment in detail, thinks it impossible that Lord Wright should have forgotten that judgment when he delivered his speech in *Wilsons'* case [73] and, with respect, this view seems the more likely. It is true that in *Wilsons'* case Lord Wright was dealing with servants or agents only, and not with others. In the *Angliss* case, says Lord Reid, Lord Wright

[67] *Ibid.*

[68] 74 L.Q.R. (1958), at p. 404.

[69] *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *Peninsular & Oriental Steam Navigation Co.* [1927] 2 K.B. 456, 460.

[70] Yet see *Paterson Steamships, Ltd.* v. *Canadian Co-operative Wheat Producers, Ltd.* [1934] A.C. 538, 547, in which Wright J. said that the effect of the Act was to imply an absolute undertaking to provide a seaworthy ship, subject to the condition "or from latent defect."

[71] *Ibid.*

[72] [1959] 2 W.L.R. at p. 340. Lord Reid (*ibid.*, at p. 348) sees no contradiction, reading the words "personal obligation" and "absolutely" in the peculiar sense which Lord Wright gives them in *Wilsons'* case.

[73] [1938] A.C. at p. 84.

thought that a shipowner would not be vicariously liable for the shipbuilder's negligence:

> "And by parity of reasoning he must have taken the same view about a master's liability in respect of plant which he had purchased. I cannot avoid the conclusion that, if the facts of the present case had been put before him in 1938, he would have decided in favour of the present respondents." [74]

One wonders. During the thirties and forties, Lord Wright was delivering a number of great judgments in which he was restating and consciously remoulding the common law. Those were the days of *Liesbosch* [74a] and *Lochgelly*,[75] of *Hillas* v. *Arcos*,[76] of *Constantine* [77] and *Denny Mott*,[78] of the *Fibrosa*,[79] of the *Cricklewood* case [80]—and of many other great cases. Lord Wright had also spoken extrajudicially of some of those matters. Of *culpa* he declared: "If, however, *culpa* means default in performance of an obligation which is personal to the defendant, then the default constitutes the *culpa*." [81]

The Speech of Lord Maugham

Lord Maugham's speech, Lord Reid finds "rather more difficult to interpret"—from the point of view of the *Davie* decision.[82] The employer's duty is there stated to be "to supply and instal proper machinery so far as care and skill can secure the result." [83] These very wide words, it is true, appear to be limited in the next sentence:

[74] [1959] 2 W.L.R. at p. 349.
[74a] *Liesbosch Dredger* v. *Edison S.S.* [1933] A.C. 449. And see "The Liesbosch Case" in *Legal Essays and Addresses* (1939), pp. 96–123.
[75] *Lochgelly Iron & Coal Co.* v. *M'Mullen* [1934] A.C. 1.
[76] *Hillas & Co., Ltd.* v. *Arcos, Ltd.* (1932) 38 Com.Cas. 23.
[77] *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd.* [1942] A.C. 154.
[78] *Denny Mott & Dickson, Ltd.* v. *James B. Fraser & Co., Ltd.* [1944] A.C. 265.
[79] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour, Ltd.* [1943] A.C. 32.
[80] *Cricklewood Property & Investment Trust, Ltd. and Others* v. *Leightons Investment Trust, Ltd.* [1945] A.C. 221.
[81] *Legal Essays & Addresses*, pp. 141 (absolute liability); 145, 146 (employers' duty); 401 (*culpa*).
[82] [1959] 2 W.L.R. at p. 349.
[83] [1938] A.C. at p. 88.

> "He can, and often he must, perform this duty by the employment of an agent, who acts on his behalf; but he then remains liable to the employees unless the agent has himself used due care and skill in carrying out the employer's duty."

Viscount Simonds dismisses the argument for the appellant under this heading with the words:

> "How can it be said that it was as the delegate or agent of the employer that the manufacturer failed to exhibit due skill and care?" [84]

But, with respect, is that what Lord Maugham meant by the duty "to supply and instal proper machinery so far as care and skill can secure the result"?

Lord Reid cautiously admits that Lord Maugham "may have meant to include care and skill by everyone concerned, including the manufacturer," [85] but in view of the succeeding sentence, that did not seem to be very likely. By "agent" he might have meant more than "servant," but "I can see no sign that he meant to go beyond persons who could properly be said to have been employed by the master to act on his behalf." It was "at least doubtful" whether Lord Maugham would have held an employer vicariously liable for the negligence of the manufacturers.

Although Lord Maugham only set out "to add a few observations" (in the words of Lord Reid),[86] one ventures to differ with respect from the literal implication of the words and from the view of Dr. Goodhart that Lord Maugham, "who would have been the first to acknowledge that he was primarily an equity lawyer, had the present question in mind when he used this phrase." [87] Was he not, with respect, endeavouring to restate the law as he saw it in a series of clear and closely knit propositions? His contributions to English law, it would no doubt readily be admitted, are not confined to equity.[88]

[84] [1959] 2 W.L.R. at p. 341.
[85] *Ibid.*, at p. 351.
[86] *Ibid.*, at p. 350.
[87] 74 L.Q.R. (1958), at p. 403.
[88] See, *e.g.*, for the same technique, the formulation of the doctrine of frustration of contract in a series of four clear propositions, in the *Constantine Case* [1942] A.C. 154, 169–170. And for an unorthodox opinion, frequently followed, see the *Sinha Peerage Case* [1946] 1 All E.R. 348.

Lord Wright in Thomson *v.* Cremin

Finally, the speech of Lord Wright in *Thomson* v. *Cremin*[89] (1941) was also relied upon by the appellant. The case dealt not with duty of employer to employee, but with the duty of reasonable care owed by invitor to invitee.

A stevedore's labourer was injured in discharging grain from the hold of a ship in Glasgow. He was struck by the fall of a shore fixed by the shipwrights in Australia in order to hold a shifting board, and certified as satisfying the regulations of the Australian Government. The shipowner, the House of Lords held, was not exonerated from the duty of reasonable care owed to his invitee by proving that he had employed a competent independent contractor. The stevedore failed in his action against the employer.

Again, in this case, Lord Wright added "a few supplementary observations on some general matters of principle." He said:

> "The duty of the invitor towards invitee is, in my opinion, a duty personal to the former, in the sense that he does not get rid of the obligation by entrusting its performance to independent contractors. It is true that the invitor is not an insurer; he warrants, however, that due care and skill to make the premises reasonably safe for the invitee have been exercised, either by himself, his servants or agents or by independent contractors whom he employs to perform his duty. He does not fulfil the warranty merely by leaving the work to contractors, however, reputable or generally competent. His warranty is broken if they fail to exercise the proper care and skill. This is only an instance of the general rule which was stated by Lord Blackburn in another connection in *Dalton* v. *Henry Angus & Co.*[90] . . . More recently this House, again in a different context of fact, applied this rule in *Wilsons & Clyde*

[89] Reported in [1953] 2 All E.R. 1185, 1191, 1192; [1956] 1 W.L.R. 103n., 110: On the history of the report, see *per* Lord Reid [1959] 2 W.L.R. at p. 357, and Mr. Heuston's account of the discovery of that case at p. ix of the Preface to the 12th ed., Salmond on *Torts* (1957).

[90] (1881) 6 App.Cas. 740, 829.

Coal Co., Ltd. v. *English*.[91] It is always a question of the extent of the duty incurred." [92]

Jenkins L.J. had relied upon this statement, on the ground that the duty owed by employer to employee is no less than the duty of invitor to invitee.[93] In this case, Parker L.J. commented that the warranty did not extend to the care and skill of persons not in contractual relationship with the defendant but only, as Lord Wright said, to the care and skill of those "whom he employs to perform his duty." [94]

Lord Reid points out that the shipowners did not seek to avoid liability before the House on the grounds that the negligence was that of an independent contractor. The observations, therefore, on that subject, were *obiter* and not part of the *ratio decidendi*. "The distinction is not entirely technical, because a judge who has not heard a question argued out before him may be less likely to see the full implications and less likely to be entirely accurate in the language which he uses." [95]

The observation, with respect, is just, but there are judges—such as Lord Wright—whose *obiter dicta* are considered to be as weighty as a judgment, particularly when they are repeated in other contexts and are in harmony with the mode of thinking expressed on other occasions.[96]

Conclusion

The *ratio decidendi* in the *Davie* case probably applies, as Lord Morton of Henryton indicates, if the employer had bought the tool directly from the manufacturers: there would equally have been no

[91] [1938] A.C. 57.

[92] [1956] 1 W.L.R. at p. 110. In *Green* v. *Fibreglass, Ltd.* [1958] 2 Q.B. 245, Salmon J. criticised the importing into this branch of the law of tort, the concept of warranty. He did not follow Lord Wright's dictum, holding that an occupier of premises is not liable for the negligence of an independent contractor employed to do skilled work on the premises.

[93] [1958] 1 Q.B. at p. 224. In *London Graving Dock Co., Ltd.* v. *Horton* [1951] A.C. 731, 746, Lord Porter said: "Admittedly the duty of a master to his servant is higher than that of an invitor to his invitee."

[94] [1958] 1 Q.B. at p. 241.

[95] [1959] 2 W.L.R. at p. 358.

[96] See, for instance, the *Fibrosa Case* [1943] A.C. 32 and the *obiter dicta* in the speeches of all the noble and learned lords that a partial failure of consideration gave rise to no claim at common law for recovery of part of what had been paid.

" delegation." [97] Lord Keith points out that purchase from a wholesale or retail merchant, without more, is not " delegation," but performance by the master.[98] And the reference in the cases to the master's duty to supply safe plant and material for his servant are " merely shorthand phrases " which mean that he has a *duty to use reasonable care to supply* safe plant and material.[99]

This, with respect, seems to be judicial re-interpretation. One remains not entirely convinced that Lord Wright and Lord Maugham really meant exactly what the House of Lords has now authoritatively declared them to have meant. But, be that as it may, the House has fulfilled its high function, if one may say so, as the ultimate tribunal of appeal, of judicially re-interpreting the conflict of authorities and of dicta. This task it has in this case achieved with unanimity and without ambiguity and by resort to a restatement of first principles. In a rapidly changing society, masters and men equally will now know, broadly speaking, where they stand, although, as Lord Reid has pointed out,[1] there still remains " a wide sphere " of uncertainty. They will know, too, that in this branch of the law no change will come save through legislation alone.

[97] [1959] 2 W.L.R. at p. 345.
[98] *Ibid.*, at p. 366.
[99] *Ibid.*
[1] [1959] 2 W.L.R. at pp. 359–360.

THE RESTRICTIVE PRACTICES COURT

VALENTINE LATHAM KORAH

THE English common law relating to conspiracy and restraint of trade proved unable to curb traders' restrictive agreements. But it is only since the last war that Parliament has provided us with the machinery to restrict their detrimental effects on the nation's economy. This legislation does not follow the American example because our post-war economy is very different from theirs, as it was in 1890 when the Sherman Act was passed and in 1911 when the first *Standard Oil* case [1] was decided and the Act became effective. The Americans had to develop the common law of restraint of trade to curb the extreme individualism then rampant. Moreover, our basic philosophy concerning monopolies is different: the Americans think that monopoly power, whether exercised by a large firm, or by a cartel, is bad in itself, being a usurpation of governmental power which, under a democracy, is entrusted to the duly elected representatives of the people.[2] In this country, throughout the history of contracts in restraint of trade, we have been far more concerned with the rise in prices which so often follows the emergence of a monopoly. It is not the power itself which we wish to prevent, but its use to the detriment of the consumer, whether it results in higher prices, lower quality or decreased services.

In many branches of the English economy we have established a State monopoly. Moreover, even outside the sphere of State-controlled industry, industrial and commercial co-operation may be beneficial to the public. In some industries, only large groups can take advantage of mass production methods and earn sufficient profits to support adequate research. The Monopolies and Restrictive Practices Commission in its report on electric lamps [3] decided

[1] *Standard Oil of New Jersey* v. *U.S.* (1911) 221 U.S. 1.

[2] Of course, it is not here suggested that monopolies in America are always broken up. Indeed, there are many industrial giants in that country. But freedom to compete seems to be a political aim, almost as fundamental as freedom of speech.

[3] *Report on the Supply of Electric Lamps*, October 4, 1951.

that, as the price-fixing scheme operated in that industry encouraged the exchange of technical information and the sharing of patents, on balance it did benefit the public and should not be abrogated. To retain and improve our standard of living, we must be competitive in world markets and competition at home may help this, but it need not be encouraged as an end in itself, to the exclusion of other economic criteria.

It is not here proposed to consider the Monopolies Commission which now deals with large firms that each control a third of the market, nor with what types of agreement should be registered with the Registrar of Restrictive Trading Agreements. It will be assumed that an agreement has been registered and that the Registrar is making an application to the Restrictive Practices Court for a finding that some of the restrictions are contrary to the public interest as defined in section 21 of the Restrictive Trade Practices Act, 1956, and, therefore, void.

The Restrictive Practices Court and Its Procedure

The Restrictive Practices Court was set up by that Act and sits at the Supreme Court in Q.B. 7. It consists of at least three members, one of whom must be a judge. At the moment, until the court has established a workable procedure, it has not exercised its power [4] to sit in more than one division. Owing to the large number of cases settled, the Registrar, with his limited establishment, has not been able, consistently with a system of fixed dates for trial, to prepare as many cases as the court can manage.[5] So far, only a few cases have been heard and in each only one judgment has been delivered. Final judgment was delivered by the President, Devlin J., in the first two cases, and by Upjohn J. in the third. The other judges who have say are Pearson J. and Lord Cameron.

In some ways the court is like a division of the High Court: it is presided over by a High Court judge and appeal lies to the Court of Appeal on points of law.[6] But here the similarity ends.

[4] s. 2 (4) and Sched., para. 3.

[5] Mr. Comming-Bruce, counsel for the Registrar (*The Times*, October 22, 1958). Indeed, the judges have been available for other duties.

[6] *Loc. cit.* in note 4, above, para. 7.

Most of the decisions of the court will be findings of fact or of the probable economic consequences of abrogating the restrictions and from such findings no appeal will lie. The methods of admitting evidence are simpler and less formal because many economic matters will have to be proved. The majority of the Bench are trained not in law but in industry, commerce or public affairs, though the judges prevail on points of law.[7] Usually no order as to costs will be made.[8]

On the other hand, the court also differs from administrative tribunals in that the sittings are in public and the judgment is fully reasoned. It differs, furthermore, from the Monopolies and Restrictive Practices Commission, which it partially replaces, in having narrower discretion [9] and in its orders being more effective than the recommendations of its predecessor.[9a]

The Registrar's appointment is, like those in the civil service, during Her Majesty's pleasure.[10] He has an establishment, but its members and the conditions of service are controlled by the Treasury, which also fixes his own salary and pension. Apart from compiling the Register and seeing that agreements are notified to him, he is responsible for the conduct of cases before the Restrictive Practices Court, for though the Board of Trade may direct the order in which the cases should be brought, it announced in October, 1958, that it would no longer do so. It seems that at the moment the Registrar is bringing cases involving different types of restrictions so that the early precedents may be as varied as possible.

Until the Michaelmas term, 1958, was well advanced, many lawyers and business men thought that the court would be largely ineffective, partly because the judges would require too much proof that a restriction would be detrimental to the public. However,

[7] *Ibid.*, para. 5.
[8] Restrictive Practices Rules, 76 and 77.
[9] See below, pp. 84 *et seq.*
[9a] For instance, in 1954, as a result of the Commission's Report in 1953, trade associations connected with the importation of timber formally abrogated certain restrictive agreements. Yet only six months later an agent refused to supply goods in contravention of the abrogated agreements, following advisory letters circulated by the trade associations, enclosing approved lists of agents and importers. See [1959] *Journal of Business Law*, 79–80. Had the case come before the Restrictive Practices Court, any infringement of undertakings given on the formal application for an injunction would have been contempt of court.
[10] s. 1.

each of the first two cases resulted in upsetting the restrictions involved and most people have changed their minds. There are now 2,000 agreements on the Register, some important, others not. Half of them are price-fixing schemes of different types. But, apart from those that were discontinued before they were registered, one hundred had been removed from the Register before the second case was decided and now, as a result of the next two cases,[11] many more may be ended or altered so as to drop the price-fixing element.[12]

Under section 20 of the Restrictive Practices Act, if the restrictions are found to be contrary to the public interest as defined by section 21, the agreement shall be void as regards those restrictions and the court may make an order restraining any of the parties to the agreement, who carry on business in the United Kingdom, from giving effect to or enforcing or purporting to enforce an agreement in respect of those restrictions and from making any other agreement to the like effect.

Under section 21 (1) "for the purposes of any proceedings before the court under the last foregoing section, a restriction accepted in pursuance of any agreement shall be deemed to be contrary to the public interest unless the court is satisfied" of any one or more of seven circumstances, "and is further satisfied (in any such case) that the restriction is not unreasonable having regard to the balance between those circumstances and any detriment to the public or to persons not parties to the agreement (being purchasers, consumers or users of goods produced or sold by such parties, or persons engaged or seeking to become engaged in the trade or business of selling such goods or of producing or selling similar goods), resulting or likely to result from the operation of the restriction."

To decide whether an agreement is contrary to the public interest as defined in section 21, a great deal of evidence of an

[11] *Re Yarn Spinners' Agreement*, L.R. 1 R.P. 118; *Re Blanket Manufacturers' Association Agreement* [1959] 1 W.L.R. 442.

[12] *e.g.*, the Doublers' Association abandoned theirs when the judgment in the *Yarn Spinners'* case was delivered (*The Times*, February 4, and March 21, 1959), and the British Radio Valve Manufacturers' Association determined theirs a week before they were due to come before the court (*The Times*, March 30, and April 9, 1959).

economic nature will have to be considered by the court, including statistical tables and other technical matters, not easily introduced by the process of oral question and answer. To meet this problem the Restrictive Practices Court Rules allow the court, on the application of the Registrar, to give such directions "as to the future course of the proceedings as appear best adapted to secure the just, expeditious and economical disposal thereof." [13] And under Rules 54 and 55 evidence not usually admissible may be admitted, such as documents, and trade and technical journals. Indeed, it seems that a large part of the economic evidence is to be given in the form of documents, to be exchanged perhaps ten days [14] before the hearing. The documents are submitted to the court on the same day and remain confidential until they are introduced during the trial.[15] Both the court and those concerned with the presentation of the case then have an opportunity of considering such information and the evidence in open court may start with the cross-examination of a witness on his proof. This saves a great deal of time, and the shorthand note is considerably reduced. The court may also adjourn to the Board of Trade cinema to see a film which may greatly shorten the explanation of conditions in the industry.

But it is unfortunate, when the hearing is public, that the public are not put into a position to understand what is going on. To gather from cross-examination what is said in examination in chief—in the documents exchanged before trial—may be impossible. One may hear the facts and theories in dispute, without knowing anything of those agreed. *The Times* has reported these cases fairly fully, but only from what was said in open court. The final judgment may state the facts necessary to its findings, but it does so only briefly. This makes a mockery of public hearings. Nor would a view of the documents as they are introduced be sufficient, as the cross-examination may be incomprehensible to anyone who

[13] Rule 33 (*b*).

[14] As suggested by the Registrar in *Re Blanket Manufacturers' Agreement* (*The Times*, November 26, 1958). But twenty days were agreed in the *Chemists'* case (see below, note 20).

[15] Devlin J. in *Re Yarn Spinners' Agreement*, L.R. 1 R.P. 118, 198. The court will not be satisfied by the exchange of a mere summary of the evidence to be presented before the court: *Re Federation of Wholesale and Multiple Bakers*, *The Times*, April 22, 1959.

has not read the written proofs—often documents of considerable length. Would it not be possible for the court, on directing that evidence is to be introduced by written proof, or, as a condition to admission of the proofs, to order that the information be made public a full working day before its introduction? Perhaps arrangements might be made for copies to be deposited in the Bar Library, at the Law Society Library, at the back of the court and in the corridor outside; for the legal profession should not have a monopoly of the evidence.

Several applications for directions have been reported. At first, they took up considerable time, but as the attitude of the court became known, more and more items were agreed, until in *Re Water-Tube Boilermen's Agreement* [16] so much had been agreed that the application was over within an hour and the court had only to endorse what had been agreed and fix a date for the trial. Devlin J., who deals with these matters, has made it clear that the parties should agree as much as possible, that surprise will not be tolerated in this court and that as much relevant material as possible should be exchanged before trial. In *Re Five Millers' Agreement* [17] the accountants are preparing a joint statement. The court will then not be concerned with these issues of fact, but only with the inferences to be drawn from them.

In the same application, Devlin J. observed that the evidence of accountants and economists should be shorter than hitherto. Some of the members of the court already had considerable experience in such matters and the others had learnt a lot during the first term. Such evidence should be confined to specific matters arising out of the investigation. He also thought that the evidence of trade witnesses should not be duplicated, unless the second witness could speak from a different point of view and their evidence should as far as possible be written and exchanged before trial, so that counsel would have a chance of cross-examining, without needing time during the trial to consider the evidence. And counsel, when cross-examining, is not obliged to challenge each trade witness on every point he desires to make.[18]

[16] *The Times*, October 14, 1958.
[17] *The Times*, December 11, 1958.
[18] *Practice Direction*, L.R. 1 R.P. 114–115.

It seems then that the court is prepared to take full advantage of the looser rules of evidence allowed it. While giving both parties a fair chance to present their case adequately, it is determined that the proceedings should be expeditious, and to that end it will encourage the parties to agree as much as possible and to duplicate as little evidence as they can. Even so, the evidence must be considerable and will be introduced in the form most readily assimilated—by written documents exchanged before trial. The success which these looser rules of evidence have had in saving time [19] and costs, without hindering justice, is a strong argument for a similar relaxation in other non-jury cases. The necessity is no doubt greater in the Restrictive Practices Court, but a great deal of time and money might be saved in other courts.

The Chemists' Case

The first case to be decided by the court was *Re Chemists' Federation's Agreement.*[20] The facts of these cases, with the economic background, are necessarily longer than is usual in other branches of the law. There is no need to deal with them or with the details of the judgment, apart from two points.

The agreement in question was one whereby manufacturers promised to sell certain medical preparations to the public only through shops employing a qualified pharmacist. When the court held the agreement contrary to the public interest it made it clear that it was not making a policy decision. That had already been done by Parliament when it enacted the statute and made such agreements prima facie contrary to the public interest and allowed the court to consider only seven possible rebutting circumstances. Section 20 makes such agreements void, not illegal. The respondents, who were highly reputable, had not broken the law until the case was decided. So when the Registrar asked for an injunction under section 20, the court refused to issue one unless cause was shown. If injunctions were granted as a matter of course, breach would amount to contempt of court and the consequences would

[19] The final hearing of *Re Blanket Manufacturers' Association Agreement* was concluded on the fourth day, though judgment was reserved.
[20] L.R. 1 R.P. 75.

be at least as serious as if the agreement were declared illegal. The respondent had done nothing wrong and had expressly stated that it would bring the scheme to an end. The court would not compel it to do so under the threat of an injunction, but liberty was given to the Registrar to apply for one should the Federation not make sufficient progress in abrogating the scheme.

One of the restrictions relating to the packaging of medicine was found to be harmless, but could not be justified under any of the heads of section 21.[21] Yet not only was it declared void, but presumably Devlin J.'s remarks about not expecting the respondents to carry on as if nothing had happened applied to this too. The result is the same if the restriction is not merely harmless, but actually beneficial to the public, if it cannot be brought within one of the seven heads. In *Re Blanket Manufacturers' Association Agreement* the restriction as to the amount of patterns to be supplied to wholesalers was found fair and reasonable as it helped to reduce costs, but was nevertheless declared contrary to the public interest.

The Registrar's Discretion

Provided that any agreement containing such a restriction is registered it is legal to give effect to it until it is declared void by the Restrictive Practices Court.[22] If it is of some benefit to the public, the Registrar may refrain from making an application, or if the restriction is not of substantial economic significance, he may make a representation to the Board of Trade under section 12, to have the restriction removed from the Register. But if the harmless restriction, no doubt of benefit to the parties to the agreement, is contained in an agreement with other restrictions, the Registrar might wish to challenge them and, though I am not suggesting that he has done so, the Registrar might use the harmless restrictions to bring pressure on the respondents, for if the application is contested, whatever the finding as to the other restrictions, the harmless ones not protected by any of the statutory heads would be declared void.

21 L.R. 1 R.P. 75, 112.
22 For it is only for the purposes of an application under s. 20 that the presumption of s. 21 applies.

Re British Constructional Steelwork Association's Agreement[23] shows how this might work. The Association had a price-fixing scheme and it also recommended certain standard conditions for contracts. When the application for directions came up, the respondents were considering whether to alter the agreement so as to cut out the price-fixing element. On the next occasion they had done so and the Registrar decided to make a representation to the Board of Trade. Devlin J. thought that this was a suitable case, so he adjourned the hearing to allow the Registrar to make a representation. On the resumed hearing, the Registrar reported that his representation had been acted upon and that consequently there was nothing left on the Register except the abandoned agreement. The case was, therefore, ended on the respondent's admission that the price-fixing scheme was contrary to the public interest and undertaking to inform the Registrar before concluding a new one.[24]

It is not here suggested that any pressure was brought in this case, but had the Registrar been doubtful whether the price-fixing scheme was contrary to the public interest, or if it was so bad that he did not wish it to remain in force while the litigation was in process, or if he found his department too busy to deal with all the urgent cases, he *could* bring pressure. Is this desirable? While it would lead to some cases being settled without the expense of litigation, it is the court that has been entrusted with the function of deciding whether the public detriment outweighs the benefit to the public. Such negotiations by the Registrar would be secret, while the court sits in public. On the other hand, the court has succeeded in encouraging the abrogation of agreements, and this power might help to accelerate the process. There is no doubt that the Registrar's department will be activated by the usual high standards of the civil service when exercising any discretion and will not abuse such powers.

The Court's Limited Discretion

The discretion of the Restrictive Practices Court is more limited than was that of the Monopolies and Restrictive Practices

[23] L.R. 1 R.P. 199.

[24] L.R. 1 R.P. 199, 203–204 and 206–207.

Commission. In the Commission's inquiry into electric lamps,[25] they found that the Electric Light Manufacturers' Association organised a price-fixing scheme with quota provision. But they also found that the leading firms in the industry, who owned most of the patents and so forth, were prepared to exchange technical information with other firms, although they would probably not do so if the price-fixing scheme were abolished. Moreover, the prices fixed were in fact reasonable and there was a substantial amount of efficient independent competition.[26] They therefore recommended that, while the quota scheme should be ended, the price-fixing one might be continued subject to certain changes and safeguards imposed in the public interest.[27]

Should this case have come before the Restrictive Practices Court, could the price-fixing scheme have been brought within any of the heads of section 21? Within paragraph (*b*) the Association would have had to show that the removal of the scheme "would deny to the public as purchasers, consumers or users of any goods . . . specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such . . . by virtue of any arrangements or operations resulting" from the scheme. There has been some argument before the court as to the meaning of the clause: does specific mean merely that it can be specified? If so, the answer is that the exchange of technical information leads to a more uniform and reliable product at a lower price. But would such benefits be substantial when considered together with the price-fixing scheme?[28] This may be doubted.[29] If they were not the court would then have to declare the scheme void. Unlike the Monopolies and Restrictive Practices Commission, it would have no discretion.

25 *Report on the Supply of Electric Lamps*, October 4, 1951.

26 § 262.

27 § 263.

28 *Re Yarn Spinners' Agreement*, L.R. 1 R.P. 118, 188–189. Or is it carrying too far the decision that price stabilisation could not be considered without the loss of a free market? If so, then it could be considered under the balancing tail-piece to s. 21 (1)—but the Monopolies Commission result could then be obtained.

29 See *Re Blanket Manufacturers' Association Agreement* [1959] 1 W.L.R. 442, where the possible benefits to the public of restrictions that were fair and reasonable were held not to be substantial. Indeed, only one restriction in all three cases has been upheld under paragraph (*b*).

The Yarn Spinners' Case

The second, and probably the most important, case decided by the court was *Re Yarn Spinners' Agreement.* For some time the cotton industry has been contracting and it still faces difficulties owing, amongst other things, to cheap labour competition from such places as Hongkong, expanding industries in America and on the Continent, and from man-made fibres. Memories of the recession of 1929–31 are vivid, so when the war-time price regulations were ended, a scheme was introduced fixing the minimum prices to be charged for various types of cotton yarn. It was based on the theory that the industry was subject to short violent recessions. The prices were fixed on artificial formulae, at the average cost to two-thirds of the industry that operated most economically, with various provisions for depreciation and so forth. But, in fact, since 1952 the spinners of most American types of yarn had sold at prices above the minimum in all for less than two and a half years. The spinners of the Egyptian types of yarn had done rather better, having sold at the minimum prices for only a third of the time. During this period a few firms had closed down, but the majority found that they could obtain a reasonable return when operating at the minimum prices. The court found that prices had been higher than they would have been had the scheme not been in operation and that there was a substantial excess of capacity beyond what it would be prudent to keep as a reserve.

"Specific and Substantial Benefits or Advantages to the Public"

The respondents had tried to defend the scheme under various paragraphs of section 21, but had abandoned all except (*b*) and (*e*). Under (*b*)[30] it had been argued that demand varied and that substantial reserve capacity was necessary in order to ensure adequate supplies in times of increased demand. However, the quarterly figures showed fluctuations in demand of not more than 10 per cent. either way. That was caused, not by the demand for finished goods, which was steady, but by trade buyers delaying their orders

[30] s. 21 (1) (*b*). See above, p. 85.

in times of uncertainty. If the scheme were abolished, there would be an incentive to buy before prices began to rise and smaller fluctuations might be expected. Further, although it was harder to arrange overtime and shift-working in the cotton industry than in others, as an unusually large proportion of workers were elderly or female, the court thought that much more could be introduced than had hitherto been done. The court refused to speculate on emergency demands, for instance, during war-time. It was not possible to foretell what the national policy would then be. The industry has to import its raw materials and, in the last war, the manufacture of cotton in this country was reduced.

The court did find that the minimum prices had encouraged investment in modernisation, which would lower prices in the long run, but it would not be a substantial benefit and so did not come within paragraph (*b*). It had been argued that if the scheme went there would be price invasion: that is to say, firms would compete in spinning types of yarn for which their equipment could not be used in the most economical way and they would lower their prices in order to invade the market. But the court saw no harm in this in an industry with excess capacity: it was just another form of competition. The argument that, when prices were fixed, greater competition was channelled into quality and services did not impress the court, which found the benefit negligible. Nor did it think there was any danger of monopoly. Even if the industry was reduced to the five firms which now controlled 40 per cent. of the industry, competition would not necessarily be reduced. In any event, the court doubted whether this concentration in the industry would happen.

Price stabilisation under the scheme worked both ways. When demand was poor, the floor kept prices from falling, but it also encouraged firms to spin to meet future demand, so, when trade improved, prices would not soar. Was this a substantial benefit? It could not be separated from the loss of a free market and was merely the other aspect of the same thing. So, considered as a whole, it was not a substantial benefit.

The next argument involved a point of law. The doublers and weavers who bought most of the spinners' products said that the

scheme was a benefit to them. But were they a large enough class for it to be a benefit to the public? The fact that they bought for trade or manufacturing purposes did not prevent them from coming within the phrase.[31] However, in view of its finding under paragraph (*e*), the court did not decide the point, as any public benefit was small enough to be easily outbalanced by any detriment.

The court, therefore, held that the scheme could not be defended under paragraph (*b*). The court assumed that, to come within the paragraph, each benefit must be substantial, for it did not consider whether the advantage of modernisation and the benefit to the weavers together made up a substantial benefit to the public. However, it appears that the court thought that the detriments far outweighed the benefits under paragraph (*e*), so the assumption probably had no effect on the decision. It was not referred to in the judgment and can hardly be considered a *ratio decidendi*.

"Adverse Effect on Unemployment"

Under paragraph (*e*) the restriction could be defended if "having regard to the conditions actually obtaining or reasonably foreseen at the time of the application, the removal of the restriction would be likely to have a serious and persistent adverse effect on the general level of unemployment in the area, or in areas taken together, in which a substantial proportion of the trade or industry to which the agreement relates is situated."

The court refused to find how many mills would be closed down if the scheme was ended, or exactly how many workers would become unemployed. The figures presented were not comprehensive. But then the matters mentioned in paragraph (*e*) were not precise. The court had to decide on the balance of probabilities. The unemployment figures did not show all the wives of men who were employed as they did not have to register, but on the other hand they showed as temporarily stopped many who were only on short time. The court made various assumptions, which were not

[31] Though it has since been argued by Mr. McGaw, Q.C. in *Re Blanket Manufacturers' Association Agreement*, that the subsection defines "purchasers" and not "the public as purchasers." It is submitted that this construction would deprive the subsection of any effect.

findings, the final one being that if the scheme was ended, about 20 per cent. of the spinners and weavers would lose their jobs and about half of them would not find other work. The married women, who were less mobile, and the elderly, who were less attractive to other firms, would, in particular, find it difficult to do so. The court, therefore, decided that the abrogation of the scheme would be likely to have a serious and persistent adverse effect on unemployment in the areas selected by the respondents. This must then be balanced against the detriment to the public.[32]

The first detriment was that, but for the scheme, the price of yarn would be lower and this might result in reductions in the other stages of production, leading to a slight but appreciable lowering of the price of cotton goods. The second was that the scheme had prevented the spinners from lowering their prices when asked to by the weavers, in attempts to secure export contracts. As a result of the scheme a substantial number of export orders, not so much for yarn as for the finished cloth, was lost. The third detriment, found by the court to be the most important, was the waste of resources caused by idle plant and short time. Together these outweighed the hardships of unemployment which the scheme lessened.

Economic Consequences of the Decision

It is submitted that, in the short term, the national resources will not be increased by the ending of the scheme. The plant will probably be sold for scrap [32a] when the steel industry has spare capacity and half of those losing their jobs were assumed not to be able to find other work. And presumably the increased poverty would indirectly lower the turnover of shops in the neighbourhood and so forth. But in the long term, it is no doubt very important. Fewer people will go into the industry, but if the ending of the scheme increases the efficiency and competitive power of the industry in world markets, there should be as much work, and new money will not be wasted in under-employed plant. Nationally we should

[32] Under the tailpiece of s. 21 (1).

[32a] This is the suggestion under the Government scheme for the cotton industry. See below, text to note 36.

benefit by increased exports, possibly lower prices for cotton goods and, if at first fewer hours are worked, it may be that in a year or so increased orders will require more labour. Indeed, this has been one of the difficulties in the cotton trade: if mills close down, they cannot again recruit the young and the skilled workers they require, as they have meanwhile found other employment.

The day after the decision was announced, the newspapers reported statements that it would not help the industry or the cotton workers.[33] No doubt there will be temporary hardship as mills close, especially if several do so at the same time: families have become used to the double pay packet. But the area is small and well connected by public transport. I am told that other jobs should be available within five or ten miles. But, no doubt, some of the older workers, who have spent all their working lives in the same mill, will retire before their time. There should not, however, be a mass emigration, leaving outstanding mortgage debts larger than the value of the houses on which they are secured. Questions have been asked in the House. The President of the Board of Trade has promised to do all that is possible to mitigate the hardship. More of the cotton towns have been added to the list of places for which D.A.T.A.C. assistance is available.[34] That means that grants are available to firms who go to these places with high employment and so provide more work where it is needed. Before judgment was delivered, the Board of Trade sent out circulars explaining this grant scheme, and in the next three weeks had more inquiries than ever before.[35] Since then, the President of the Board of Trade has presented the Cotton Industry Bill [36] to Parliament to enable the Cotton Board to prepare a scheme to be submitted to the Board of Trade. As a result the employers have agreed on the amount of compensation to be paid to workers who become redundant and the Government is prepared to pay up to £30 million for the scrapping of plant to eliminate excess capacity

[33] *The Times*, January 27, 1959.

[34] *The Times*, February 4, 1959. Under the Distribution of Industry Act, 1945, which was revived in July, 1958. The scheme is described and criticised in *The Times* on February 18, 1959.

[35] *The Times*, February 11, 1959.

[36] Bill 106. 605 H.C.Deb. 5 s., col. 1250. May 13, 1959.

and later for the acquisition of modern machinery. On February 4, 1959, it was announced from Tokyo that new controls had been placed on the export of grey cloth to Britain,[37] and negotiations are going on with Pakistan.

What about the firms that go out of business? No doubt a great deal of plant was written down to nothing years ago and it is arguable that the decline of an industry is a normal business risk. It is still suggested that a levy should be imposed on the firms remaining in business for the benefit of the others. But unless care is taken to preserve the competitive power of the continuing firms, this might undo the benefit of the decision to reduce capacity. Professor G. C. Allen, C.B.E.,[38] of this College, has suggested that if any levy is made, it should be in the form of an issue of shares, on which dividends would be paid only out of profits. Since judgment was delivered mills have been closing down[39] and there will probably be mergers, efficient mills being bought up by their richer colleagues.

The decision seems to have been welcomed by responsible opinion: indeed, the main fear of the cotton manufacturers seems to be that they will not be able to persuade the workers who now leave to return to the industry. The Chairman of the Manchester Chamber of Commerce said in February, 1959, that this, rather than lack of demand, would limit production soon, perhaps as early as the end of 1959.[40] The closing of mills should not lead to much unemployment, for the other mills will require extra labour to meet the demand.

It was at one time thought that a temporary scheme might be substituted for the one declared contrary to the public interest, perhaps with lower minimum prices. However, the court decided that it could not consider such a substitute scheme at the very end of a case, when it would require an almost complete rehearing. The power under section 20 to adjudicate on a scheme introduced during the proceedings might be used during pleadings, or for a

[37] *The Times*, February 5, 1959.
[38] I am indebted to Professor Allen for a conversation on the economic consequences of the *Yarn Spinners'* case. But he is in no way responsible for my comments.
[39] *The Times*, April 2, 1959.
[40] *The Times*, February 10, 1959.

textual amendment later during the hearing, but the court would not anticipate its future decision.[41] However, even economically speaking, it was probably better to make a clean break. Buyers have less reason to withhold their orders and so forth.

The *Yarn Spinners'* case has affected the doublers as well—they discontinued their price-fixing scheme as soon as judgment was delivered. But its greatest importance is, no doubt, that it shows how narrowly paragraph (*b*) will be construed. The British Radio Valve Manufacturers' Association discontinued various restrictions because of this narrow interpretation.[42] No doubt other agreements will also be abrogated.

Re Blanket Manufacturers' Agreement[43]

In the third case decided by the court it had to consider a minimum price scheme, but it differed from that in the *Yarn Spinners'* case in that the minimum was set so low that a negligible number of blankets were sold below it. It was also different in that it applied only to a small range of production of white wool raised blankets. It was alleged that since the minimum price was based on the cost to the producers who could make the blanket most cheaply and was reviewed at least four times a year, the scheme was advantageous to other producers, who thereby knew the cost to the most efficient producers. It was also alleged that the scheme tended to keep prices down as manufacturers tried to keep as near to the minimum as they could. However, the court decided that any benefit to the public was not substantial within paragraph (*b*); for although it might be described as a stop-loss scheme intended to prevent cut-throat competition during a depression, and so encourage investment in the industry, it affected too small a proportion of the national production of blankets to be effective. The scheme might have some effect in keeping down prices, but it was only small compared with other factors.

The court did, however, uphold a restriction for the first time; the Association required minimum weights of wool to be used for

[41] L.R. 1 R.P. 118, 197.
[42] *The Times*, March 31, and April 9, 1959.
[43] [1959] 1 W.L.R. 442.

the different sizes of some types of blankets. This was found to provide a practical, though not a conclusive, test of minimum quality. As such it was a substantial benefit within paragraph (*b*) and was not outweighed by the detriment to the public of not finding cheap blankets so readily available.

So paragraph (*b*) of section 21 is not to be useless after all. In each of the cases heard by the court, it was argued that the restriction resulted in a substantial benefit to the public, but this is the first case in which any benefit has been held to be substantial. The case is also of interest in that it seems to imply that some minimum price schemes might be upheld. If the stop-loss scheme had affected all types of blankets, then it might have been sufficient to prevent cut-throat competition during a recession. If it were proved that this encouraged investment in an expanding and competitive industry, with no unreasonable excess capacity, and that the investment resulted in a cheaper or better product, then the scheme might be a substantial benefit to the public. If the price were fixed as low as that in the blanket industry, then there would be no likely increase in price except during a depression to outweigh any such benefit. I therefore do not subscribe to the view that no price scheme could ever be upheld by the court.

Although one restriction was upheld, several others were not, as, although they were fair and reasonable and entirely harmless, possibly even beneficial to the public, they were not of substantial benefit and so must be declared void. The case was therefore adjourned on the formal application of the Registrar for an injunction, so that the parties should have an opportunity of agreeing on an undertaking by the respondents. Such adjournments will normally be for seven days.

Conclusion

The members of this entirely new court, under its President, Devlin J., have been so skilful and successful in establishing a workable and speedy procedure and in making their attitude to various restrictive agreements clear that many have been abrogated and there are not enough cases to keep the court fully occupied.

Not only have the judges been able to sit in the Queen's Bench Division and on assize, but the court has decided to keep one term entirely free. Devlin J. has been appointed Chairman of the Parliamentary Commission to investigate the disturbances in Nyasaland. It had been feared that, though he was obviously the best possible choice as President of the new court, his duties would prevent him from undertaking any other tasks. Happily this has been proved false. The court has had a very considerable effect on our economy at a comparatively small cost in the time spent by some of the most skilful lawyers and economists.

The law and practice of the court may perhaps be summarised as follows: (1) The Restrictive Practices Court has made full use of the looser rules of evidence allowed to it and so evolved a speedy and effective procedure. (2) It has made it clear that all registrable restrictions which are contained in agreements brought before the court are prima facie contrary to the public interest as defined by the Act. As a result they will be void. (3) However, an injunction will not be granted as a matter of course, but only if there is reason to think that the respondents will continue to give effect to the restriction. (4) Since registrable restrictions are valid until the Restrictive Practices Court has declared them contrary to the public interest and the Registrar has a discretion whether to bring cases before it, he may be able to bring pressure on respondents to agreements with more than one restriction. (5) All three cases decided by the court have been concerned with paragraph (*b*), but only one restriction was found to come within it. "Substantial benefit or advantage" means more than a benefit which is not negligible. But, on the other hand, the qualification "substantial" has not deprived the paragraph of all effect. (6) The attitude of the court has led to the abrogation of many agreements; so the court is not fully occupied and its members have been available for other duties.

FREEDOM OF ASSEMBLY IN THE COMMONWEALTH

Denys C. Holland

Certain rights are recognised as fundamental in any free society—equality before the law, freedom of speech, freedom of the person, freedom of assembly, freedom of religion, and perhaps freedom of property. In previous papers in this series the first three of these topics have already been dealt with.[1] Let us turn now to freedom of assembly. Under this heading are included not merely the right to hold meetings and processions, but also, to a limited extent, freedom of movement and freedom of association. The importance of these matters is so well known that to dwell upon their value would be to court the charge of banality. Without freedom of assembly neither social nor political development can be achieved peaceably from below. And if the object of our tutelage in the colonies is, as is so often stated, to lead these territories towards democratic self-government, then, not merely permission, but more, encouragement to promote political parties, is obviously essential. The party system lies at the root of our system of government and it needs no stress that parties cannot be formed unless people are free to organise, to meet, to associate.

On the other hand, some restrictions upon this freedom, as indeed upon all freedoms, are obviously essential in the interests of public order and democracy itself which may well be destroyed if freedom is abused. The shape which those restrictions must take must equally obviously depend to a large extent upon the state of society in different countries. It would be generally agreed that freedom of assembly must be limited to peaceful assembly for peaceful purposes, that the right to create and change opinion and laws by peaceful means must be protected, and that coercion must be prevented. But the risk of violence and coercion may vary

[1] See Vols. VIII (1955), p. 74, IX (1956), p. 184, and XI (1958), p. 151, of this *Annual*.

greatly in different societies. So, too, it would be generally agreed that freedom of assembly must be restricted to a greater extent in times of national emergency than in more normal times, but opinions as to whether the emergency is national or personal may again vary. Without an intimate knowledge of conditions in a particular society, judgments on the legitimacy or otherwise of restrictions on freedom may well be dangerous. But whatever the state of society may be, it would probably be agreed generally that such restrictions as exist should be certain and well defined and imposed directly by the law rather than by the discretionary authority of the police or other executive authority.

The subject under discussion is wide—freedom of assembly in a Commonwealth containing some thirty colonies and other dependent territories as well as the independent members, including the United Kingdom. This paper will, however, be in fact largely confined to the dependent members of the Commonwealth since ample information already exists as to the United Kingdom and independent members of the Commonwealth. It will furthermore be limited primarily to non-emergency provisions since it would be generally agreed that emergency provisions stand on a different footing and require a distinct treatment.

Although it is not intended to dwell upon the right of assembly in the United Kingdom it is desirable to state briefly the legal position in this country, for those few who may not be aware of it, in order to give a basis for comparison or contrast with the position in those countries which are dependent upon us. Dicey, in his account of fundamental liberties in England stresses the absence of arbitrary or directionary powers. Such restrictions as exist are imposed by the law itself and not by discretionary authority of the executive arm of government.[2] A, B and C and a thousand or ten thousand more persons may go where they like and say what they like provided they do not break the law. Such is the right of assembly.

But, as Sir Ivor Jennings has pointed out, the restrictions imposed by the law are so numerous that liberty in practice depends

[2] A. V. Dicey, *Law of the Constitution* (9th ed., 1950), p. 188, and see generally pp. 270–283.

upon the fact that the law is not enforced strictly; the police clearly exercise a considerable discretion through their control over the decision whether or not to prosecute.[3] There are numerous restrictions both upon the place of assembly and what may be said or done at an assembly. The laws of trespass and nuisance, the provisions of section 72 of the Highway Act, 1835, dealing with obstruction of the highway, local authority by-laws, the decision in *Duncan* v. *Jones*[4] empowering the police to arrest for obstruction in the execution of duty any person whom they reasonably fear will cause a breach of the peace—these and other laws make the legality of any assembly doubtful unless it is held on private property with the consent of the owner. And even then if the meeting is public it is, of course, subject to the decision in the somewhat unsatisfactory case of *Thomas* v. *Sawkins*[5] empowering the police to be present in certain circumstances. Having found a place in which the assembly may be lawfully held, the assemblers still remain subject to the serious risk of contravening one or more of the many laws restricting what may be said and done at the assembly. The laws of unlawful assembly, rout, riot, the power to bind over to be of good behaviour and to keep the peace, the provisions of the Public Order Act, 1936, amongst other matters, all have to be considered by the organisers of the assembly. The result of all these laws is that the principle of *Bealty* v. *Gillbanks*,[6] upon which Dicey laid so much stress, that an assembly is not unlawful merely because it is feared that others may cause a breach of the peace by interfering with it, has become of no practical importance.

The number and width of the laws restricting freedom of assembly in England are only tolerable in a free society because the police, in such a large number of cases, exercise their discretion not to prosecute. And this police discretion is made tolerable and controllable only because, as Sir Ivor Jennings has pointed out, there are free elections every five years at least and an Opposition ever ready to draw attention to abuses of power.[7]

[3] Sir Ivor Jennings, *The Law and the Constitution* (4th ed., 1952), p. 246, and see generally, pp. 253–260.
[4] [1936] 1 K.B. 218.
[5] [1935] 2 K.B. 434.
[6] (1882) 9 Q.B.D. 308.
[7] Jennings, *loc. cit.*, in note 3, above, pp. 259–260.

The restrictions on freedom of assembly in overseas dependencies are, it is hoped to show, similar in many respects to those existing in England. These legal restrictions may, however, be more serious than in England owing to the absence of the restraining influences of a vigorous press, free elections and other extra-legal checks such as prevail in the United Kingdom. The laws of the different dependent territories are largely similar in terms and it would, therefore, be profitless and unnecessary to cite them all here *in extenso*. It suffices, therefore, to cite the various laws of particular dependent territories which are typical of many and to deal with such few cases as exist concerning their interpretation.

Unlawful Assembly and Riot under Colonial Penal Codes

Generally one finds in a Colonial Penal Code a section or group of sections defining the offences of unlawful assembly and riot. Provisions typical of this general pattern are to be found in section 76 of the Kenya Penal Code, which provides as follows:

> "When three or more persons assemble with intent to commit an offence, or, being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause persons in the neighbourhood reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly. It is immaterial that the original assembly was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid. When an unlawful assembly has begun to execute the purpose for which it is assembled by a breach of the peace and to the terror of the public, the assembly is called a riot, and persons assembled are said to be riotously assembled."

This provision obviously represents an attempt to reproduce without substantial modification the common law of England relating to unlawful assembly and riot. The references to three or more persons, the reasonable fear of a breach of the peace, the

provocation of other persons, without reasonable occasion, to commit a breach of the peace, are all matters which have been the subject of case-law in this country and most probably they would receive the same interpretation as in England. Indeed, the definition of riot follows very closely the wording of Stephen's *Digest of the Criminal Law* concerning the same matter.[8] Where, however, the wording of the Colonial Penal Code is not identical with English law on the same subject, it is well established that English cases are not necessarily binding. This point was made clear in a case concerning the interpretation of section 69 of the Nigerian Criminal Code decided by the High Court in the Western Region of Nigeria. This section provides:

> "When three or more persons, with intent to carry out some common purpose, assemble in such a manner as to cause persons in the neighbourhood to fear on reasonable grounds that the persons so assembled will tumultuously disturb the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace, they are an unlawful assembly. It is immaterial that the first assembly was lawful if, being assembled, they conduct themselves with a common purpose in such a manner as aforesaid. . . . When an unlawful assembly has begun to act in so tumultuous a manner as to disturb the peace, the assembly is called a riot, and the persons assembled are said to be riotously assembled."

In the case of *Busari Adebiye and Others* v. *Police*[9] the appellants had been convicted of riot contrary to section 71 of the Criminal Code (this section making it an offence to commit riot as defined in section 69). The ground of appeal was that there was no evidence that the assembly was unlawful. In the judgment of the appeal court it was stated:

> "The ingredients in unlawful assembly are well known and guidance is to be found in numerous English decisions, but these decisions do not always apply as the terms used in

[8] Stephen, *Digest of the Criminal Law* (9th ed. by L. F. Sturge, 1950), Art. 92.
[9] [1955–56] W.R.N.L.R. 49.

> the Nigerian Code must not be departed from. In the present case it is not disputed that three or more persons were assembled together. There is evidence that the crowd, whatever the precise number may be, rushed at the complainant, beat him and stripped him naked in daylight in the street of Oyo. If such conduct is not calculated to cause fear in the minds of persons in the neighbourhood that there will be a tumultuous breach of the peace, then I do not know what is."

Even where the words of the relevant Colonial Penal provision differ slightly from English common law on the subject, the same conclusions are, however, often reached by judicial interpretation. An illustration of this is to be found in the case of *Commissioner of Police* v. *Senedju Dyadjagonoh and Others*,[10] an appeal from the Supreme Court of the Gold Coast to the West African Court of Appeal, heard in 1945. This case concerned the interpretation of sections 342 and 355 (1) of the Criminal Code, which provided as follows:

> Section 342: "If any persons assemble or are together with a purpose of committing a riot, each of them is guilty of a misdemeanour."
>
> Section 355 (1): "If five or more persons together in any public or private place commence or attempt to do any of the following things, namely, (*a*) to execute any common purpose with violence and without lawful authority to use such violence for that purpose; or (*b*) to execute a common purpose of obstructing or resisting the execution of any legal process or authority; or (*c*) to facilitate by force or by show of force or of numbers the commission of any crime, they are guilty of riot."

Those sections, of course, differ in certain respects from English case-law on unlawful assembly and riot. Thus, for example, the number of persons necessary to constitute a riot is greater under those provisions. The particular problem before the West African Court of Appeal in this case concerned the meaning of paragraph (*b*) of section 355 (1). A number of persons had assembled together

[10] (1945) 11 W.A.C.A. 64.

" with the beating of drums to deliberate over and assent not to accept the payment of tolls or proposed taxes." Non-payment of taxes, it should be noted, constituted a civil offence only and was not a crime under the Code. It had been held in the lower court that they were guilty of unlawful assembly in that they were together " to execute a common purpose of obstructing or resisting the execution of legal process or authority." The West African Court of Appeal quashed the conviction, stating: " We are of the opinion that the words ' resisting authority ' are incapable of being stretched to mean agreeing to omit to pay a lawful civil debt, and that in order to obtain a conviction under section 355 (1) (*b*) it is necessary to show that the persons concerned assembled together for the purpose of actively resisting authority, and it is not sufficient to prove a passive agreement to omit to pay a civil debt to the government." This would seem to approximate to the English common law view that there must be a fear of violence or breach of the peace, although these words did not appear in that particular paragraph of section 355 (1).

A question which was recently settled in Ghana, which does not appear to have ever been in issue in the English courts, is that unlawful assembly can be committed in a moving vehicle. This question arose in the case of *R.* v. *Sarpong and Frimpong*.[11] The facts of the case were as follows. On January 28, 1956, the two appellants, with three other persons unknown, were travelling from Ashanti to the Bakama area in an open land rover painted with the colours of the National Liberation Movement. On passing an area known as the Car Washing Park (Narkama), which was known to be used by members of the Convention Peoples Party, the first appellant shot at and wounded two bystanders. The vehicle and its occupants then travelled back along the same route and the first appellant again shot at persons in the Narkama area where the police had by now arrived. The appellants were charged with numerous offences including, *inter alia*, unlawful assembly with other persons unknown. It was held that on a charge of unlawful assembly it was immaterial where the assembly took place and it

[11] (1957) *Supreme Court of Ghana*, p. 342.

was, therefore, no defence to the charge that the persons concerned were assembled in a moving vehicle.

Proof of a common purpose seems to be generally insisted upon just as strictly as in English law as a necessary ingredient of unlawful assembly and riot. A case illustrating this is *Nyeru S/O Runyerje* v. *R.*[12] This case concerned a charge of unlawful assembly contrary to section 76 of the Kenya Penal Code (to which section reference has already been made above). The appellant was one of sixteen Africans found in a lorry which was stopped on the night of September 30, 1952, by a District Officer in the Embu District. The lorry belonged to an Asian who was driving it contrary to his employer's orders. The passengers were lying down so as not to be seen, the number plate was whitewashed over, and knives and crowbars were found the next day at the place where the lorry was stopped. Conviction on a charge of unlawful assembly under section 76 of the Kenya Penal Code was quashed on appeal because no common purpose was alleged in the particulars of offence nor proved in evidence. Although there was no doubt that burglary or housebreaking was intended, it had not been proved that such common purpose existed.

In addition to defining unlawful assembly and riot in terms similar to English common law, or at least interpreted in a similar manner, the Penal Code of a colony generally also contains provisions corresponding to the Riot Act of 1714—in other words, provisions corresponding to the English offence of statutory riot. A typical example of this is section 79 of the Kenya Penal Code which provides:

> "Any magistrate or, in his absence, any commissioned or non-commissioned officer of police not below the rank of assistant inspector, second grade, or any commissioned officer in the military forces of the Colony, in whose view twelve or more persons are riotously assembled, or who apprehends that a riot is about to be committed by twelve or more persons assembled within his view, may make or cause to be made a proclamation in the King's name, in such form as he thinks

[12] (1953) 26 K.L.R. 68; Criminal Appeal No. 805 of 1952.

fit, commanding the rioters or persons so assembled to disperse peaceably."

It will be observed that this provision differs from the offence of statutory riot in England in that the person reading the proclamation is empowered to read it in such form as he thinks fit, whereas in England the law insists upon a strict adherence to the wording of the proclamation.[13] Section 80 of the Kenya Penal Code then provides, in terms similar to the Riot Act, 1714:

> "If upon the expiration of a reasonable time after such proclamation is made, or after the making of such proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorised to make such proclamation, or any police officer, or any person acting in aid of such person or police officer, may do all things necessary for dispersing the persons so continuing assembled, for apprehending them or any of them, and if any person makes resistance may use all such force as is reasonably necessary for overcoming such resistance, and shall not be liable in any criminal or civil proceedings for having by the use of such force, caused harm or death to any person."

Again it will be noted that there is a departure in one respect from the corresponding English law, in that this provision requires dispersal after a reasonable time, whereas the English law requires dispersal after a specified time, namely, one hour. Under section 81 of the Kenya Penal Code the penalty for taking part in an assembly after the expiration of a reasonable time from the reading of the proclamation is five years' imprisonment, and under section 82 the penalty for forcibly preventing the reading of the proclamation is ten years' imprisonment and, for remaining knowing the reading has been forcibly prevented, five years'. The penalty for the corresponding offences under the Riot Act, 1714, is much more severe—life imprisonment.

Although the provisions of a colonial penal code defining unlawful assembly and riot generally correspond to English

[13] See, for example, *R.* v. *Child* (1830) 4 C.L.P. 442, where the magistrate omitted the words "God Save the King" at the end of the proclamation.

common law and statutory provisions on the same subject, these provisions are generally reinforced in colonial territories by police ordinances giving express powers to the police to control assemblies and processions and imposing licensing requirements which have no counterpart in English law.

Police Powers concerning Assemblies and Processions

A typical example of a colonial police ordinance giving powers to the police to control assemblies and processions is the Kenya Police Ordinance of 1948. The sections primarily concerned with assemblies and processions are sections 28 to 32. Brief reference only need be made to sections 28 and 29. Section 28 empowers the police to place barriers across streets and roads and public places for the preservation of order and the prevention and detection of crimes. Section 29 empowers the police to control traffic, keep order and prevent obstructions on highways and other places of public resort. Section 30 provides:

> "(1) Any superior officer or any inspector in charge of any part of the Force stationed in any area, or any administrative officer of any area where there is no superior officer or inspector in charge, may, in such manner as he may deem fit—(*a*) regulate the extent to which music may be played on public roads or streets or at places of public resort, in such area; (*b*) direct the conduct of all assemblies, meetings and processions on public roads or streets or at places of public resort in such area and may prescribe the route by which and the time at which any such procession may pass;
>
> "(2) Any person who is desirous of convening or collecting any assembly or meeting, or of forming any procession, in any public road or street, or at any place of public resort, in any area, shall first make application for a licence in that behalf to the nearest superior officer or inspector in charge of any part of the force, or, where there is no such superior officer or inspector in charge, to the administrative officer having jurisdiction in such area, and if such superior police officer, inspector or administrative officer, as the case may be, is

satisfied that the assembly, meeting or procession is not likely to cause a breach of the peace, he shall issue a licence, in such form as may be prescribed by the Commissioner, specifying the name of the licensee, and defining conditions upon which such assembly, meeting or procession is permitted;

"(3) Any police officer or administrative officer may stop any procession for which no licence has been issued under the provisions of subsection (2) of this section, or which contravenes any of the conditions of such a licence, and may order the persons comprising such procession or assembly to disperse."

Section 31 provides:

"Any person who (*a*) disobeys any order given under the provisions of subsection (1) or (3) of section 30 of the Ordinance, or (*b*) contravenes any condition of a licence issued under the provisions of subsection (2) of section 30 of this Ordinance, shall be guilty of an offence."

Section 32 provides:

"Any assembly, meeting or procession (*a*) which takes place, without a licence, issued under the provisions of subsection (2) of section 30 of this Ordinance; or (*b*) in which three or more persons taking part neglect or refuse to obey any order given under the provisions of subsection (1) or (3) of section 30 of this Ordinance, shall be deemed to be an unlawful assembly, and all persons taking part in such assembly, meeting or procession and in the case of an assembly, meeting or procession for which no licence has been issued, all persons taking part in convening, collecting or directing such assembly, meeting or procession shall be guilty of an offence and on conviction thereof shall be liable to imprisonment for a term not exceeding one year."

The meaning of "place of public resort," meetings in which without a police licence are thus prohibited in Kenya, is not defined in the Ordinance itself, but was considered in the case of *R.* v. *Peter Kaman S/O Ngaruya.*[14] This was an appeal, by way of case

[14] (1953) 26 K.L.R. 65.

stated, against the acquittal of the accused on a charge of "taking part in and convening, collecting or directing an unlawful assembly at Nyaga School contrary to section 32 (*a*) of the Police Ordinance, 1948." The accused had issued invitations to all and sundry to attend a meeting at Nyaga School and the meeting was in fact attended by persons other than those connected with the affairs of the school. The question in issue was whether the Nyaga School was a place of public resort. The prosecution contended that "place of public resort" meant what it means in English law, reference being made to the case of *R.* v. *Wellard*,[15] in which Grove J., in interpreting section 29 of 14 & 15 Vict. c. 100, held that "a public place is a place where the public go whether they have a right or not," and *Sewell* v. *Taylor*,[16] where it was held that a private house being used for a public auction was for that occasion a place of public resort.

The court took the view, however, that the English cases were not directly relevant, since to support a conviction under section 32 (*a*) of the Police Ordinance it was necessary to show that the school was a place of public resort at the time the invitations were issued and not merely at the time the meeting was held. "The people who issued invitations to attend a meeting at Nyaga School could have been convicted of convening a meeting under section 32 (*a*) only if they issued the invitations without a licence and if, at the time the invitations were issued, the school was already a 'place of public resort.' It was therefore necessary to prove that the school was a 'place of public resort' at that time before members of the public attended the meeting; and it is clear from the case stated that it did not have that character at that time or at any time." The court pointed out that the meeting may have been an unlawful assembly independently of the Police Ordinance provisions but the prosecution under section 32 (*a*) was in its view misconceived.

It may be observed that the absence of a definition of "place of public resort" is not a common feature of all colonial police ordinances. Thus the Nigerian Police Ordinance of 1943 (which

[15] (1884) 4 Q.B.D. 63.
[16] (1860) 29 L.J.M.C. 50; 141 E.R. 776.

contains provisions very similar to the Kenya Police Ordinance) provides that "any place to which any members of the public or any particular class of the public may at any time obtain admission on payment or by general invitation for any of the purposes mentioned in this section shall be deemed for such time to be a place of public resort." [17]

Curfew Laws

In addition to ordinances prohibiting assemblies and processions without a licence, many colonies have curfew laws which equally, of course, have no counterpart in English law. Sometimes curfew laws are found as a part of the police ordinance, sometimes they are contained in separate ordinances. An example of the former is the Police (Amendment No. 2) Ordinance, 1950, in Kenya. This Ordinance adds a new section 64 to the principal Police Ordinance, reading as follows:

> "(1) If at any time it shall appear to the Commissioner, or to a Provincial Commissioner, that there is a reasonable apprehension that a riot, an unlawful assembly, a concerted breach of the peace, or organised intimidation by threats of violence, will take place in any area within the Colony, or within the Province of such Provincial Commissioner, as the case may be, the Commissioner or such Provincial Commissioner may by an Order (in this section referred to as a Curfew Order) direct that no person or no such class or description of persons as may be specified in the Curfew Order, shall, otherwise than in compliance with such conditions or provisions as may be contained in the Curfew Order, be out of doors within such area during the hours of darkness, except under the authority of a written permit granted by a police officer or other officer specified in the Curfew Order.
>
> "(2) A Curfew Order shall be promulgated in such manner as shall, in the opinion of the Commissioner, or the Provincial Commissioner, as the case may be, be best fitted to bring it to the notice of the persons concerned and shall remain in force

[17] s. 36 (4) of the Police Ordinance, 1943 (Nigeria).

until varied or rescinded by an Order made by the authority which imposed it or by the Governor in Council as hereinafter mentioned.

"(3) Every Curfew Order made by the Commissioner or by a Provincial Commissioner shall, as soon as conveniently may be, be placed before the Governor in Council, and the Governor in Council may, if he thinks fit, vary or rescind the Order.

"(4) The variation or rescission of a Curfew Order shall be without prejudice to anything done under it prior to such variation or rescission or to any proceedings in respect of any contravention of such order commenced prior to such variation or rescission.

"(5) Any person who shall fail to comply with the provisions of a Curfew Order may be arrested without warrant and shall be liable to a fine not exceeding one hundred shillings or to imprisonment which may extend to one month or both such fine and imprisonment.

"(6) In this section the expression 'hours of darkness' means the period between 6.30 p.m. and 6.30 a.m. or such less period between these hours as may be specified in the Curfew Order."

It should, perhaps, be emphasised that this law, in common with all other laws mentioned in this paper, is not an emergency provision, but a part of the permanent law of the country.

It should not be thought, however, that curfew laws have their place only in territories under the control of the Colonial Office or under the influence of a white settler population. It is interesting to observe that as recently as 1958 the Government of the self-governing territory of Western Nigeria saw fit to pass a Curfew Law which provides that "whenever the Governor in Council is satisfied that it is necessary to do so for the purpose of maintaining and securing public safety and public order in any area within the Region, he may, by order, impose a curfew upon the inhabitants of that area." Once a curfew has been imposed under that law, nobody (except the Governor, the Premier, members of and the Secretary to the Executive Council, the Chief Justice, judges of the

High Court, magistrates, members of the armed forces in uniform, the police and medical practitioners) can be abroad within the hours specified in the Curfew Order without a permit. A permit can be granted by any police officer not below the rank of Assistant Superintendent. Indeed, Western Nigeria seems to have had quite a spate of legislation dealing with assemblies and processions, having also passed recently laws corresponding to our Public Order Act, 1936, and Riot Damages Act, 1886, although again this merely follows the pattern set in colonial territories generally.

Public Order Ordinances

A typical example of a Public Order Ordinance is the Public Order Ordinance, 1950, of Kenya, which follows closely the wording of the United Kingdom Public Order Act, 1936. The Kenya Ordinance prohibits quasi-military organisations (s. 3), offensive weapons at public meetings and processions (s. 4), and offensive conduct conducive to a breach of the peace (s. 5). Section 6 (which should perhaps be set out *in extenso* since it differs slightly from the corresponding provisions of the United Kingdom Act) provides:

> " The Governor in Council may from time to time by order prohibit the wearing in public places or at public meetings of:
>
> (*a*) uniforms or any distinctive dress which signifies association with any political organisation or with the promotion of any political object;
>
> (*b*) any uniform, distinctive dress or emblem by members or adherents of any organisation or association specified or described in the order, whether incorporated or not,
>
> (i) when, in the opinion of the Governor in Council, members of that organisation or association are organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown; or
>
> (ii) when, in the opinion of the Governor in Council, members of that organisation or association are

> organised or trained or equipped for the purpose of enabling them to be employed for the use of or display of physical force in promoting any political or other object or in such a manner as to cause reasonable apprehension that they are organised or trained or equipped for that purpose."

This Order differs from the United Kingdom Act in several respects. It does not purport directly to ban the wearing of political uniforms but merely authorises the Governor in Council to impose such a ban from time to time; the order does not contain any provisions concerning the routeing and banning of processions, these presumably being unnecessary in view of the powers of control given by the earlier Police Ordinance of 1948.

The Western Nigeria Public Order Law of 1957, on the other hand, does contain provisions similar to the United Kingdom Act with regard to these two matters. This law, which came into force on November 14, 1957, directly prohibits the wearing of uniforms signifying association with political organisations or objects at any public place or public meeting. There is an express provision, however, that uniform does not include any form of customary dress. It also authorises any superior police officer to give directions as to the routes to be taken by a procession and to prohibit it from entering specified public places, and to apply to the local authority for an order prohibiting processions for up to three months. Unlike in the United Kingdom, however, a superior police officer may himself prohibit processions for up to fourteen days. There is a further provision, not to be found in the United Kingdom Public Order Act of 1936, to the effect that if the Minister is of the opinion that it is expedient in the interests of good order that notice should be given of public meetings or public processions, he may require twenty-four hours' notice of such meeting or procession to be given to persons specified in the order. That restrictive laws of this nature should be found necessary at the very outset of independence may perhaps be regarded as a somewhat unhappy omen for the future. Together with the Curfew Law and the Public Order

Law, Western Nigeria has also passed recently (as has also Eastern Nigeria) a Riot (Damages) Law which again is in conformity with the general pattern of colonial legislation but is perhaps unfortunate if it is necessary, as one must assume it is, at this stage of their national development. To this topic it is now proposed to turn.

Compensation for Riot

Many colonial territories have provision for the payment of compensation by the inhabitants of an area where rioting occurs involving expense or damage. An example of such provisions is contained in the Police Ordinance, 1948, of Kenya. Section 53 provides:

> "The Governor may by proclamation in the *Gazette*, and in such other manner as he may direct, declare that any area in the Colony is in a disturbed or dangerous state, or that, by reason of the conduct of the inhabitants of such area or any class or section of such inhabitants, it is expedient to increase the number of police officers stationed in such area."

Additional police may then be stationed there and the cost involved charged on the inhabitants by order of a magistrate.

Section 54 provides that "if in any area in which such a proclamation has been issued, death or grievous harm, or loss of, or damage to, property, has been caused by or has ensued from, the misconduct of the inhabitants of such area, any person claiming to have suffered loss, damage or injury by such misconduct may within one month apply to a magistrate for compensation"; the magistrate may then assess the amount of the compensation to be paid and the proportions in which the inhabitants are to pay it, and make an appropriate order. No order under section 54 can, however, be made unless the magistrate is of the opinion that the damage has been caused by riot or unlawful assembly and that the claimant was himself free from blame. Furthermore, if a person receives compensation under this section, he is barred from seeking further compensation by ordinary civil proceedings. Section 54 is, of course, not very dissimilar from the provisions of the United Kingdom's Riot (Damages) Act, 1836, save that under the latter

Act compensation is payable out of the police fund instead of, as formerly even in England, being levied on the general inhabitants directly. The ultimate effect on the inhabitants' pockets is not, however, very dissimilar.

Recently, as pointed out earlier, Riot (Damages) Laws along the same lines have been enacted in both Western and Eastern Nigeria. These laws, however, approximate more closely to the United Kingdom Act in being limited to damage to property and in not containing provisions for levying the cost of extra police on the inhabitants. Thus the Riot (Damages) Law, 1958, of Eastern Nigeria provides in section 3 that where any house or other building has been damaged or destroyed, or any property or article has been damaged, stolen or destroyed, in the course of a riot or unlawful assembly, compensation shall be payable to persons suffering loss. The damages, as under the Kenya law, are levied on the inhabitants directly, but the person injured is not barred from suing civilly, any damages recovered civilly (as also any insurance compensation paid) being merely deducted from the damages payable under this Law.

Proclamation of Dangerous Areas and the Banning of Societies

The laws mentioned so far restrict freedom of assembly on any view of the content of that freedom. It is not possible, however, to leave this topic without a brief mention of two further matters, namely, the proclamation of dangerous areas and the banning of societies, although the former might more usually be regarded as an aspect of freedom of the person and the latter as an aspect of freedom of association as a distinct freedom in its own right.

Many colonies contain powers to close certain areas in the interests of public security, and the movement of persons into and out of such areas is then prohibited unless they have a pass or licence. These laws fall into two distinct categories; there are those which do not impose restrictions on the right of the local inhabitants to live there, and there are those which empower the exclusion from the closed area even of the local residents. An

example of the former type of law is to be found in Kenya, where the expulsion from Proclaimed Areas Ordinance, 1950, provides for the expulsion from a proclaimed area of any person other than natives of such a proclaimed area. An example of the latter type of law is section 11 of the Hongkong Public Order, 1950, which empowers the Governor to require all classes or certain classes of persons to evacuate any area within a limited time or for a period specified in the order. Both types of laws only indirectly affect the right of assembly and need not be dwelt upon here.

More directly limiting freedom of assembly are colonial laws restricting the formation of societies, although here it may well be said, as already pointed out, that this matter requires separate consideration under the heading of freedom of association.[18] One example without comment may, therefore, suffice. For such an example one may turn again to Kenya, where sections 69 to 72 of the Penal Code give wide powers to the executive to control the formation of societies. Under section 69 any society is unlawful, if, *inter alia*, the Governor in Council, by order, declares it to be a society dangerous to the good government of the country. Section 70 renders liable to imprisonment for seven years any person who manages or assists in the management of an unlawful society. Section 71 renders liable to three years' imprisonment any member of an unlawful society and any person who knowingly permits a meeting of an unlawful society to take place on his premises. And section 72 provides the limitation that prosecutions may only be commenced with the consent of the Governor. It was, of course, under these provisions that Mau Mau was declared unlawful and the prosecution of Jomo Kenyatta and others occurred.[19]

Conclusion

It has only been possible in this paper to deal with a few of the colonial laws restricting freedom of assembly, but these few are typical of the general pattern of non-emergency colonial legislation

[18] See the Indian Constitution, Art. 19, where the two freedoms are treated as separate and distinct.

[19] See the writer's "Law and Order in Kenya," in Vol. VII of this *Annual* (1954), pp. 183–186.

on this topic. On the whole these non-emergency colonial laws do not appear to be very dissimilar from the restrictions imposed in the United Kingdom. However, as has been emphasised at the outset of this paper, the strict letter of the law is modified in the United Kingdom by the presence of extra-legal sanctions, and the fact that our laws date from a pre-democratic era is not, therefore, a very serious danger. Whether the same checks will suffice in overseas territories, as and when they become independent, or whether changes in the law will be required if freedom of assembly is not to perish still remains to be seen. Meanwhile, whilst these territories remain under United Kingdom tutelage, such extra-legal checks as there are must obviously emanate primarily from the House of Commons rather than from within the territory itself.

THE RATING OF CHARITABLE AND SIMILAR ORGANISATIONS

Donovan Waters

In recent years a good deal of attention has been given to what Professor Keeton once described in this series as "the charity muddle." [1] In 1952 the Nathan Committee [2] reported on the broad sweep of the law concerning charities, and in 1955 in a report on the taxation of income and profits the Radcliffe Commission [3] made further reference to the problem. On only one major point concerning charities did these reports both speak, and, characteristically enough in this field, they differed. The Nathan Committee considered the then existing content of the term "charity" to be substantially right, but, while making no real suggestion, looked for a new statutory definition which would at once enable the courts to get away from the somewhat archaic terms of the statute of Elizabeth I,[4] and also preserve the existing case-law. On the other hand, from the point of view of income tax and the statutory exemption given to charities, the Radcliffe Commission was of the opinion that the content of charity was already too wide, and looked for a more limited and precise boundary for those organisations which enjoy the benefit of subsidy at the expense of the taxpayer. Finally, in commenting upon the Nathan report, the Government announced in 1955 that they saw "no reason to change the present content of charity," [5] and, having decided to let well alone, they have since attempted merely to retain the commonly conceived contents of the term.

Since 1948, however, the charity problem has arisen in the more remote field of valuation and rating, and in recent years it has assumed all the characteristics of urgency. Prior to 1948 all rating

[1] Vol. II of this *Annual* (1949), p. 86.
[2] Cmd. 8710 (1952).
[3] Cmd. 9474 (1955).
[4] The preamble to 43 Eliz. 1, c. 4.
[5] Cmd. 9538 (1955), at p. 3.

assessment was carried out by the local authorities who also fixed the annual rate in the pound and levied the rate among those assessed. In this way local authorities were each able, by making what were termed "sympathetic assessments," to give considerable and varying relief to organisations occupying rateable property within their respective areas. The procedure was simple; if the local authority considered that an organisation warranted subsidy at the expense of the general body of ratepayers, it either altogether omitted the organisation from the assessment list or fixed its assessment to some degree below that which would otherwise have been imposed. The only conceivable authority for this practice was the Rating and Valuation Act, 1925,[6] which permitted a local authority to remit or reduce the rate on account of the poverty of the person liable. But in fact even this statutory power was rarely invoked in relation to charities because it was so difficult to assess poverty. As a result most local authorities carried out this known, but unquestioned, policy, while others kept to the letter of the law.

Under the Local Government Act, 1948, however, responsibility for rating assessment throughout England and Wales passed to the Department of Inland Revenue. The determination of rate in the pound and actual levying were left to the local authorities; the Inland Revenue was merely to assess uniformly the rateable values of all property in the country. The Inland Revenue having embarked upon this comprehensive assessment, it soon became clear that all sorts of organisations which had formerly enjoyed varying degrees of relief from full assessment were about to lose these advantages. Moreover, the prospective increase in a great many cases was as high as 200 or 300 per cent., and it was evident, since the Inland Revenue had no authority to do other than apply the letter of the law to all rateable property, that many organisations were faced with extinction.[7] The urgency of the situation was such

[6] s. 2 (4). There is a similar provision for Scotland: Local Government (Scotland) Act, 1947, s. 244.

[7] The increase in rates actually levied in 1957–58 was nearly one-third over the total levy for 1955–56; see December 9, 1957: *Parl.Deb.*, *Official Report*, House of Commons, Vol. 579, col. 910. The Inland Revenue seem to have done what they could. In the Commons in 1955 Sir Ian Horobin spoke of a case where the Inland Revenue provisionally put a value on a charity building on the basis of it being a warehouse for flock mattresses; June 28, 1955: *ibid.*, Vol. 543, col. 298.

that temporary legislation was rushed through Parliament in 1955[8] with the idea of continuing relief for all those bodies that had enjoyed it in 1948, so that, the new lists having come into force on April 1, 1956, a little time remained for further experience with the new problem. Then in January, 1958, a committee under Sir Fred Pritchard was appointed by the Government to consider the whole question of the rating of charitable and similar organisations, other than certain religious buildings. The report of that Committee has yet to be presented, and to result in a permanent solution to the problem.

The Nature of the Problem

The question, already familiar in the field of tax relief, is now broadened: which organisations are to have relief from the rates and taxes imposed by the State in its guise of local and central authorities? It does seem important at the outset to realise that the problem is as wide as that. The central authority fixes and levies income tax in order to finance its policies, while the local authority fixes and levies rates for an identical local purpose.[9] It is even easier to see this picture as merely one of financing when one reflects that local income tax has often been suggested as a preferable alternative to the existing system of a Tudor-inspired scheme of rating. From this point of view it is clear that there is an obvious connection between de-rating and tax relief; there is no logical reason why concessions extending to an activity in one field of finance should not apply in the other, unless, of course, the central authority deliberately assumes all fiscal loss arising from

[8] The Bill had a chequered career. It was first presented in the Commons on March 18, 1955, given a second reading on April 6, 1955, and committed to a standing committee. Apparently before committee consideration it was withdrawn by the Government, and all references to Scotland deleted. The Bill was re-presented on June 10, 1955, and given a second reading on June 13. It was considered by a committee of the whole House on June 27, 28 and 30, and on July 6 it was recommitted by the Government for the purpose, *inter alia*, of introducing the new clause (now s. 8). The Report stage was taken on the same day.

[9] The original basic rating principle of benefit derived had lost all significance since before 1945; see W. E. Jackson, *Local Government in England and Wales* (1945, revised 1949), p. 172.

concessions in order to relieve local finances.[10] But such an assumption is largely irrelevant to the issue of who is to enjoy concessions, which, once granted, should be common to any financial levy.

Hitherto, since the Exchequer alone loses through an extensive taxation relief, the Government has felt able to accept the inevitability of the existent state of the charity case-law, but such an attitude is not possible in the matter of rating where, as evidenced by the debated topic of "block grants," there arises the whole difficult relationship of central and local financing. For the first time two considerable groups in the community with somewhat different interests in the solution of the charity problem have come face to face, and, unfortunately, they meet on the controversial and unsolved ground of de-rating. Many local authorities would prefer that they alone should decide which property occupiers in their respective areas should enjoy relief from the local levy, while the various benevolent organisations would rather see some statutory formula within the bounds of which no local authority could deny relief.

The object of this paper is to study the arguments, and to consider the various possible solutions.

The Two Viewpoints

(1) *The Local Authorities*

One of the main arguments advanced by local authorities, whether they are in favour of complete local discretion or a discretion solely in relation to non-charitable organisations, is that a statutory definition to embrace deserving organisations cannot but avoid indiscriminate relief to all those organisations which come within its terms. It is indeed a powerful argument that any definition will ultimately benefit those who technically qualify, and possibly deny benefit to some who are only within the spirit of the parliamentary intention. Sir Ian Horobin[11] pointed out in the

[10] As is done with general Exchequer grants to compensate local authorities for agricultural and industrial de-rating: Local Government Act, 1929.

[11] Sir Ian has a considerable experience as a trustee of several charitable organisations, especially playing field trusts.

House of Commons during the 1955 debate that this problem has been a constant thorn in the discussions of the playing fields associations with the Government when those discussions were attempting to work out a common definition for relief.[12]

In some quarters the opinion of the Radcliffe Commission has been repeated that the confines of charity itself are too all-embracing, and from this the view has been taken that rating relief should be discriminatory even among legal charities. The dangers of such an argument are self-evident; Sir Ian Horobin thought that it " would do more harm than good " [13] to go behind legal charity, and, indeed, over and beyond the inevitable confusion there returns the argument that if rating relief should be restricted within charitable organisations then the limits of charity should themselves be cut down to the same extent. However, the local authorities well contend in reply that, while the Inland Revenue is unable to consider on their merits all the organisations which qualify for tax relief under the umbrella of charity, each local authority can do so, as it has in fact been doing for many years past. Why, say the local authorities, should we not be allowed to continue to consider the value of the work and needs of each organisation before extending to it a subsidy from its fellow ratepayers? The ratepayers wish to see that the subsidy is merited, and the local authority is charged with representing the interests of all the members of the electorate. In this light some councils have difficulty in seeing what commensurate benefit ratepayers receive in extending considerable relief, as at present, to organisations which serve the country, and indeed the world.[14] And several contend

[12] *Supra*, footnote 7, col. 293.

[13] *Ibid.*, col. 295. Figures published by the Ministry of Housing and Local Government for the year 1957–58 reveal that local authorities do wish to discriminate among legal charities. *E.g.*, notice under s. 8 of the Rating and Valuation Act, 1955, had been served before April 1, 1958, upon 82 per cent. of the educational, and 55 per cent. of the social welfare, hereditaments qualifying under s. 8 (1) (*a*). Of the 55 per cent. coming under social welfare 61 per cent. of notified hereditaments were clearly occupied in work for the young, the aged, the poor, the sick and the needy. The reason for notice given in the majority of these cases was the desire to revert to discretion, though this must be balanced with the fact that there was no appreciable similarity in the totality of reasons given by different authorities.

[14] This is the view of Cambridge City Council in relation to the university. A memorandum on the subject of rating relief for deserving organisations was

that they should be free to relieve those organisations which provide services that otherwise would have to be provided by the local authority.

It will be observed from this that when local authorities stress the advantages of local discretionary rating relief they highlight their consequent ability to assess the value of an organisation from two angles. First, to ensure that the organisation is performing needy work or (sometimes additionally) that it is financially hard pressed. Secondly, to ensure that the organisation is performing work directly advantageous to the area ratepayers or relieving the authority of the duty to supply some services. That organisations would often have to pass both tests is evidenced by the complaint from one member during the 1955 debate that a statutory definition would compel local authorities to relieve playing fields which, enjoying relief, then permitted not the local people but persons from outside the area to use the grounds.[15] From the point of view of the local authority this double criterion is fairly regarded as an obligation to the area population, and when the local authority is particularly pressed for such facilities, for example, playing grounds in a built-up area, the second test of local advantage may assume outweighing importance whatever the charitable element of the organisation.

Local discretion has another advantage. A charitable organisation which makes little or no income would in any event pay little or no income tax, so that the subsidising taxpayer loses a very small amount in affording tax relief to an organisation which is idle or outdated and kept in being merely for the advantage it offers of maintaining old acquaintanceship.[16] But this same position does not hold for rating authorities. A statutory definition would give relief to any organisation which was able to show that its written constitution, usually appearing in its original trust deed, brought it within the statutory terms. Upon any such finding the particular local authority would be obligated to give relief whatever

presented to the Pritchard Committee; see *The Times*, April 25, 1958. A similar memorandum has been presented to the Committee by Westminster City Council; see *The Times*, June 20, 1958.

15 *Supra*, footnote 7, cols. 301–302.

16 See *The Times*, December 16, 1958.

demerit attached to the current activities of the organisation, and, dependent upon the location and size of the organisation's premises, that relief might be considerable.

Naturally, in areas where there is a large number of organisations which would qualify under any statutory relief the problem is felt most acutely, and it is not without interest that it is these authorities which are pressing primarily for total local discretion. Such authorities could be compensated by the Exchequer grant system, but the factor must never be overlooked, though it is sometimes overplayed, that the less finance is levied locally the more is the particular authority dependent upon central grants and the terms that may be attached to those grants.[17]

(2) *The Charitable and Near-Charitable Organisations*

The organisations concerned see the problem from rather a different angle. Diverse in their characters, aims and the extent of their endowments, in making ends meet most of these bodies have been experiencing ever greater difficulty each year since the last war. Heavy taxation affects the amounts which the public can donate, and inflation has considerably lowered the value of their investments. The diminishing value of the pound since 1946 and the flight from fixed interest securities has had the effect, for example, that a sum of £1,000 invested in Government stock in 1946 possessed the capital value of £500 in 1957 or the equivalent in 1946 pounds of only £312 10s.[18] In a great many cases these organisations are compelled to launch special periodic efforts in order to balance their accounts, and the effect of any sudden rise in their costs can and does have grave adverse effects upon their work.

[17] The proportion of rates to Exchequer grants in December, 1957, was in the ratio of 5:6. The net proceeds of re-rating divided between ratepayer and taxpayer in the ratio of 2:1; December 9, 1957: *Parl.Deb., Official Report*, House of Commons, Vol. 579, cols. 907–908.

[18] This particular stock, 2½ per cent. Treasury, possessed within shillings the same capital value in January, 1959, but a real value of £308 6s. Income on this stock has also declined in real value by one-third. See also "The Diminishing Pound," *The Times*, May 16, 1958, showing that the £ at that date stood at 37 per cent. of its 1938 value. On the other hand, charities, which possess the power to invest in "equities" and are restrained from so doing solely by innate conservatism, cannot expect the taxpayer or ratepayer to subsidise in lieu of a wise investment policy.

It is against this background that the organisations concerned attach considerable importance to a statutory relief. They point out that, though discretion allows the local authority to reward deserving local effort, there have been and will be differences of opinion from authority to authority upon which organisations should receive assistance, and which are in need. It is also inevitable that there should be differences of view and proportion between, for instance, crowded urban areas and well-to-do semi-rural areas, but this is not all—in the same local authority area a change of political party might well usher in changes of policy towards all or some assisted organisations.

The effect of this lack of uniformity is that national organisations with branches all over the country may find themselves, as in the past, receiving anything from no relief in one area through the scale to total relief in another. The National Spastics Society and the Royal National Lifeboat Institution are but two cases in point.[19] From the organisations' point of view these distinctions are quite irrational, and involve the expenditure of sums, relieved by the generosity of one local authority, in the payment of rates to another. And there are many distinct organisations doing similar work but in different authority areas who will have no central head office to bring these disparities to light, though the same disparities exist and in an unknown number of cases.

Not only will each authority have scope for forwarding its own concept of values, but some authorities may feel impelled financially to grant less relief than other authorities to equally deserving organisations. Areas like Westminster, Cambridge and Eton might well feel, and justifiably, that in relation to their total rateable properties the proportion of those eligible for relief was so high that less as a result could be given.

To the organisations local discretion means added financial worries. The offer and amount of relief can change from year to year, and with an uncertain income planning ahead is even more difficult. Added to this the organisations feel they are at the

[19] Pre-April 1, 1956, rating disparity is reflected in the operation of s. 8 of the Rating and Valuation Act, 1955; for the Society's position, see correspondence in *The Times*, December 19, 1957. For the Institution's position, see the debate in committee on the above Act; *supra*, footnote 7, col. 309.

mercy of the local authorities, and to varying degrees dependent upon catching the interest of council members. As was said in the House of Commons,[20] it is even conceivable that a local authority could drive such an organisation out of existence, and then offer to buy its land at the authority's price.

In the light of these arguments the question put by these organisations is simple; if agricultural and industrial land and premises qualify for uniform rating concessions, why should the mere diversity of benevolent organisations deny them a similar, regulated relief? And to this question is added another; if agriculture and industry could be assisted by Government-dictated relief through the inter-war depression, then is not the current financial plight of public-spirited bodies as well meriting for similar relief?

Parliamentary Proposals

It was evident in the parliamentary debates on the Rating and Valuation Act, 1955, that neither side of the House of Commons or of the Lords was confident of any particular solution. Whatever solution was adopted it would merely be a balance of relative disadvantages; in this position the Government openly approached the matter, and during the debates in the Commons several solutions were canvassed.

As it was originally upon introduction, the Bill proposed that the existing total remission of rates for churches and chapels be retained, and extended to church and chapel halls which, as the then Minister of Housing said, were now seen to be a vital adjunct to already exempt property. The Bill went on to propose[21] that each rating authority should have the power in its discretion to reduce or remit the rate to any hereditament held upon trust for use as an almshouse or "occupied by trustees for charitable purposes, or . . . occupied by any club, society, or organisation which is not established or conducted for profit and whose main objects are religious, educational or philanthropic." Strangely enough, the Minister did not comment upon this particular language, though

[20] *Supra*, footnote 7, Vol. 543, col. 971.
[21] Clause 6 (4).

it was clearly aimed at the inclusion of organisations outside the legal limits of charity; comments were rather made upon the reasons for the adoption of local discretion. "I am not at all enthusiastic," said the Minister, "about the complete discretion which is being given, but, frankly, I do not see how we can operate it centrally." [22]

The implications of this policy of half-despair received a dubious welcome from various parts of the House, but the Opposition appeared to have no real alternative solution. During the Committee stage [23] the principal Opposition speaker moved an amendment to add community halls and village centres to the list of totally exempt buildings, but, as some members expressly made clear, this was no solution since it merely added individual premises or organisations which managed to secure individual representation on the floor of either House. And it is surely fair to say that the temptation to list organisations in a wilderness of potential candidates must be as stoutly resisted now as it has been in the past.

Yet a third suggestion came from Sir Ian Horobin,[24] and he pressed for a threefold scheme of total exemption, partial exemption and local discretion for different organisations. Trusts of open spaces classified as charities were to enjoy total exemption, all other charities were to be partially exempt at a fraction to be agreed, and the peripheral near-charities were to be relieved from rates at the discretion of local authorities. Sir Ian could see no alternative to discretion for the final class of organisations, but he did think that Parliament should agree on statutory principles which might be laid down for the guidance of the authorities.

The Minister alone subsequently referred to this proposal in any detail,[25] and he took the point of statutory partial exemption. The

[22] (Mr. Duncan Sandys) on the Second Reading of the Bill; April 6, 1955: *Parl. Deb., Official Report,* House of Commons, Vol. 539, cols. 1299–1302.

[23] June 28, 1955: *supra,* footnote 7, cols. 290–291. This was a very different view from that which Mr. Lindgren himself put forward during the Second Reading on April 6, 1955, *supra,* footnote 22, col. 1208; "I feel, therefore, that this is one case in which there ought to be a general rule laid down for guidance so that all kinds of organisations can know that they will receive fair treatment as between one area and another."

[24] *Supra,* footnote 7, cols. 291–301.

[25] During the recommittal stage of the Bill. See July 6, 1955: *ibid.*, cols. 1149–1155.

disadvantages of such a remission were that it was extremely difficult to fix a percentage of relief, and also likely to lead to a situation where the minimum remission became in effect the maximum. But, though Sir Ian's proposals struck more of a balance between the interests of the organisations and the authorities, one further criticism might have been canvassed. Why were the open spaces and playing field trusts to be singled out for total exemption, and other charities left reliant upon partial exemption? Were these proposals in part but a veiled attempt to gain preferential treatment for particular charities? Sir Ian explained the distinction on the grounds that the proposed partially exempt charities enjoy some services of the local authorities, but this is surely too slim a difference upon which to base such a distinction of principle. Moreover, a great many playing fields enjoy local facilities.

However, pressed by these representations, the Government recommitted the Bill to the House, and a new clause was introduced which subsequently became section 8 of the Act. This section, now so familiar, introduced a statutory definition covering charitable and near-charitable organisations.[26] These bodies were to pay the same sum in rates in the first year of the new list as they had paid in the last year of the old, and to pay thereafter at least for three years on a reduced basis. However, the local authorities were enabled to give a three-year notice of their intention to revert to total local discretion, and on the conclusion of that period any relief for the notified organisations would depend indefinitely upon local discretion. In separate paragraphs of section 8 (1) a similar relief was given to almshouses, and playing fields coming within a statutory formula.[27]

The debates which ensued in each House [28] upon the subject of section 8 were not analytical of the statutory language, and the Minister offered no explanation of the slightly different language employed in the new section 8 (1) from that appearing in the original clause 6 (4). Nor did later speakers query the language-

[26] s. 8 (1) (*a*).
[27] s. 8 (1) (*b*) and (*c*).
[28] July 6, 1955: *supra*, footnote 7, cols. 1148–1196. July 11, 1955: *Parl.Deb.*, *Official Report*, House of Lords, Vol. 193, cols. 554–589; July 19, 1955: *ibid.*, cols. 815–860; July 21, 1955: *ibid.*, cols. 961–972.

changes or the present language-form. Later judicial interpretation, however, has revealed that these changes proved to be highly significant; their effect has been to confine very closely the organisations which qualify and are not charitable; the original clause invited the authorities to consider rate relief over a possibly much wider field. Those criticisms which were voiced were met by the Government in both Houses with the answer that this section was intended solely as a *pro tempore* measure, and the debates were conducted on the basis that the new clause compromised the need for stability and the call for discretion until it could be seen what was the practice of the authorities. Once again, as in the committal stage, the Minister stressed the great difficulty in drawing up a formula in the event of a permanent statutory exemption or remission, and expressed the view that it was only by preserving local discretion that the formula in the new clause could be widened to take in the causes members had earlier thought deserving. On this somewhat ominous note the debate was conducted, and the schools of opinion reconciled.

Possible Permanent Solutions

In proposing section 8 (1) to the Commons in 1955 the Minister said: "The method proposed in this Clause gives us the flexibility which is derived from local discretion, while at the same time preserving the possibility if necessary of intervention by Parliament before any serious harm can be done." [29] Since the enactment of the 1955 Act the majority of hereditaments protected by section 8 have received notice from their respective local authorities of the intention to revert to local discretion, and the earliest exercise of such discretion which is possible under the Act is as from March 31, 1960.[30] Therefore, if any harm to these organisations is not to ensue, legislation to combat it must, unless retrospective, have received the Assent by that date. It is for these reasons that the

[29] *Supra*, footnote 7, col. 1115.

[30] *Westminster City Council* v. *London University King's College* [1958] 1 W.L.R. 920. The Rating and Valuation Act, 1959, s. 2, has now postponed the date of taking effect of any such notice until April 1, 1963. In addition to the figures given in footnote 13, 51 per cent. of religious (other than s. 7) and 63 per cent. of miscellaneous charitable hereditaments have received notice. Also 55 per cent. of almshouses, and 61 per cent. of playing fields.

Pritchard Committee's recommendations are looked for with such urgency.

With the various parliamentary proposals and the debates inside and outside Parliament behind us, what then are the possible permanent solutions? Many variants are possible, but it seems that a choice is entailed between three broad proposals:

(1) Total discretion in the local authorities, guided by statutory principles, to grant rate relief to deserving organisations.
(2) Statutory exemption (or partial exemption) for organisations coming within a formula similar to that in section 8. Possibly an additional discretion, similarly guided, for other bodies thought deserving by local authorities.
(3) Statutory exemption (or partial exemption) for legal charities, and a discretion, as described in (2), in relation to other deserving organisations.

In each of these proposals local discretion, once exercised, might lead to a fixed minimum statutory relief.

The Merits of These Solutions

(1) *Total Discretion*

It must be said at the outset that the argument put forward by the authorities who advocate this solution is most powerful. Any responsible local authority is anxious to maintain the rate in the pound at the lowest possible figure commensurate with the efficiency of the services it is required to provide. Some authorities will be able to construct shopping areas, and thus raise their rateable values in compensation for revenue lost in de-rating, but some will be in no position to attract industry and the consequent general Exchequer grant, or otherwise increase their rateable values. Over and above all, however, the authorities argue that the object of rating is to finance local services provided by the local authority for the benefit of local ratepayers. The premier criterion of de-rating, therefore, must be commensurate benefits conferred by the claimant on the locality for whose benefit the rates are levied.[31]

[31] This view is forcibly expressed in the memoranda of both the Cambridge City and Westminster City authorities.

And the local authorities are peculiarly in a position to assess the value of those benefits to the particular locality.

It seems, therefore, that the only ground upon which this powerful argument can successfully be assailed is that total local discretion could not of its very nature provide an adequate answer to a national problem. A national problem requires a uniform national policy; how far does the rating relief of charitable and near-charitable organisations constitute such a problem? This question might be regarded as one of values,[32] and indeed it is possible to contend with some force that, despite the considerable growth of the notion of the State's obligation to provide welfare facilities of all sorts for the national community, yet the inspiration for the initiation of further efforts to improve the community's welfare must always come from the voluntary act of the individual. This is the spring of charity. Furthermore, it can be argued that there are many fields of deserving effort for the public benefit which would only suffer impoverishment by a State control or even a government dictation of policy. Yet, since their vitality is essential, those same fields must be nationally nurtured, and only from the centre can their advantage to the nation as a whole be adequately assessed.

However, it appears that the case for a national policy is incontrovertible when looked at from the point of view of finance. If these organisations are deserving in any form at the hands of the community, then their continued survival or effective future existence is dependent upon the maximum amount of long-term planning which the policies of the community can extend. It has long been evident that the distinction between systems of income tax and of rate relief is suspect, and it is difficult to appreciate why national and local financial levies should be so arranged that deserving organisations are impelled to bring themselves within "charity" in order to gain a permanent tax relief, while they must annually present their several cases in order to secure rate relief. Is the local benefit criterion itself so impelling that deserving

[32] The dispute over the rate exemption of the London Library under the Scientific Societies Act, 1843, was often conducted in the press on these lines; see, *e.g.*, *The Times*, July 30, 1958.

organisations nation-wide must be submitted to the hazards of innumerable, and often unpredictable, local annual reviews of rate relief? This depends upon the extent to which these organisations are deserving of a national policy, and the recognition of their deserving character has in a great many cases been confirmed by the considerable growth since 1914 of State subsidies.

It has been said before, and only needs mention on this occasion, that since 1914, and particularly since 1945, the social revolution has changed the whole significance of the contents of the legal meaning of charity. What areas of charity are not now wholly financed by the State are reliant in many cases upon State subsidy. Indeed, in its recent annual report the Royal Opera House Company considered it one of "two fundamental *desiderata*" for its continued existence that it should have from the Arts Council an annual grant of a sum which amounted to over 40 per cent. of last year's total income, and, though recent increases of subsidy would suggest otherwise, reliance upon subsidy is extensive throughout the arts.[33] The financial reliance of higher education institutions upon the grants of the University Grants Committee is further evidence that the days of erratic and substantial private endowment are almost gone.[34]

The local authorities are not unaware of the considerable Exchequer subsidies, indeed some authorities themselves make smaller but valuable grants.[35] However, many authorities argue that, if an organisation is receiving State assistance or is State supported, then the organisation has no case for rate relief. Why, it is asked, should local ratepayers subsidise the Exchequer when the very fact of an Exchequer grant is evidence of the national or

[33] See *The Times*, January 9, 1959. The Government announced on January 23, 1959, that they were making, at least for the present, a grant of £450,000, practically the sum sought.

[34] Where it exists, the commercial company has almost totally replaced the individual. See also the present position of State-aided Church schools; *The Times*, January 23, 1959.

[35] One and a half million pounds during 1957–58 were voluntarily contributed by local authorities to exempt organisations, mostly for purposes of education and social welfare. However, of the 89 per cent. of authorities who made a return to the Ministry on this point, 65 per cent. made no contributions at all. Moreover, an analysis of 1957–58 contributions suggests that there is no correlation between areas, or between the value to the community of the work of an organisation and the size of contributions.

international benefits conferred by the particular organisation? These subsidised organisations, it is thought, should pay the full rate and recover, if at all, against the Exchequer. But this argument shows that the fact of subsidy has moved the issue on to another plane. The question now becomes—who subsidises these organisations for the purpose of rates, the Government or the local authority? With or without a national policy one of the two must give assistance, for if, under a system of local discretion, an authority for whatever reason withdraws or reduces rate relief, the organisation concerned must inevitably seek an increased Government subsidy. Such a result would mean that a parsimonious local authority could rest assured of an indirect Exchequer grant to maintain its rate charges. Haphazard arrangements of this sort, involving as they do the resources of the national taxpayer, necessitate the substitution of a consistent and long-term policy.[36]

Furthermore, if directly subsidised organisations are in need of national policy, does the same need cease to exist in the case of those organisations not directly subsidised? The answer depends upon what basis the Exchequer subsidises. Undoubtedly many organisations receive support because they are of a distinctly national or international flavour,[37] or because they are performing work of a national value.[38] But, though national in character, many are not receiving support because their financial plight is not desperate, or

[36] There is another point. The universities, for instance, are required to budget two years or so ahead when submitting their proposed plans and requirements to the University Grants Committee. They must equally be able to predict their regular annual financial commitments each year during that quinquennium. To predict fluctuations of local rate demand may prove no easy task, and an unexpected increase of demand during the quinquennium will impose extra calls upon an already fully committed U.G.C. grant.

[37] *e.g.*, the Association of Special Libraries and Information Bureaux, which has recently been concerned principally with work in East Germany; see *The Times*, January 13, 1959.

[38] *e.g.*, the work of the Arts Council in aid of music, drama, opera, ballet and pure art. Many of these organisations at present enjoy total exemption from rates under the Scientific Societies Act, 1843. But, since the Pritchard Committee is also required to consider this Act, a note must be added. The Sorn Committee said in relation to Scotland (Cmd. 9244—1954) that "under modern conditions," when these organisations receive assistance from the rates or Exchequer funds, a rate exemption is "unnecessary." Repeal of the Act was therefore recommended. The same recommendation can be put on another basis: that there is no case in an age of subsidy for distinguishing the arts and sciences from other subsidised or charitable organisations. However, the Sorn Committee appear to have given no consideration to the implications of their own recommendation.

because in the present economic circumstances there is a rigid limit to which the Exchequer feels able to give assistance. Sometimes the Exchequer subsidises merely to tide over an organisation, attaching the condition that a specific sum be raised from other sources, and in this way organisations may ultimately cease to be eligible for grants since the Exchequer is subsequently of the opinion that sufficient private support is now forthcoming.[39]

Evidently there is no clear national and local distinction between directly subsidised and non-directly subsidised organisations, or between the two groups at any one time, so that, while the pressure continues for a Royal Commission which would consider the whole nature, implications and policy of State subsidy, national and local, there is no clear case for leaving the latter organisations to the total discretion of local authorities. Moreover, the necessity for a national policy for these latter organisations might be said to have been implicitly confirmed by the fact that no one has suggested that the Inland Revenue should cease to give the indirect subsidy of tax exemption to charitable organisations whose work is exclusively or mainly carried on within one local authority area. Nor to the writer's knowledge has anyone suggested that tax relief should be awarded on the basis of local authority recommendation.

Despite, then, the local dislike of a dictated and indiscriminate largesse, and however conscientiously many authorities would exercise their discretion, it seems inevitable that a permanent solution in the form of a total local discretion must be firmly rejected.[40]

(2) *Statutory Formula including Non-Charitable Organisations*

It is now proposed to examine the merits of the two principal ways in which a uniform national policy might be legislatively expressed. The first to be considered is the adoption of a statutory

[39] See *supra*, footnote 37.

[40] By one of those strange turns of government the Valuation and Rating (Scotland) Act, 1956, s. 23 (1), adopts the solution of total local discretion, and the language of s. 8 (1) of the 1955 Act (England and Wales) is reproduced in s. 23 (1) as the guiding principles for the exercise of the discretion. This section, which also subjects scientific, literary and fine art organisations to local discretion, was not referred to by Government speakers, or by any speaker in either House during any debate on the Bill! The section comes into effect in 1961.

formula which would guarantee a permanent protection, either through a total or partial exemption, of all organisations charitable and near charitable, of the type which were receiving relief of some sort on March 31, 1956. It is clear to the untutored eye that some organisations will qualify technically as charities, while others which more merit the description in the popular sense will not. Should a new statutory formula for rate relief attempt to redress some of the inequities of taxation relief by deliberately embracing a wider section of organisations? Cambridge City and Westminster City Councils agree in strongly opposing such a formula on the grounds that the existing section 8 (1), which attempts this policy, is "far too wide."[41] But there may be an argument for saying that a statutory formula which succeeds in this attempt, might well prove a possible ground for the ultimate statutory change of the legal definition of charity.[42]

Nevertheless, it would not be in the interests of deserving organisations for the legislature to adopt yet another untried definition of the bodies which it was hoped to relieve of rates. Few can afford the costs of litigation through the courts,[43] and, even if the organisations are to be forced to clear two statutory definition hurdles in five years, there is no guarantee that the courts will ultimately interpret the formula in the hoped-for manner, or that it will be found to be flawless. Experience with specific language is by far the best guide, and one naturally turns to the suitability of section 8 as a permanent solution.

(a) *Section 8 (1) (a).* This paragraph runs as follows:

> "any hereditament . . . which is not established or conducted for profit and whose main objects are charitable or are otherwise concerned with the advancement of religion, education or social welfare."

The charge that these words are far too wide is not substantiated by an analysis of reported cases in the High Court and quarter

41 Cambridge City memorandum. The Council extends this same criticism to the whole of s. 8.

42 Though this would be against the recommendations of the Radcliffe Commission.

43 It is not without interest that the only two cases on s. 8 (1), which were taken to the House of Lords, were taken there by a wealthy friendly society and a professional organisation respectively.

sessions.[44] The wording may appear vague and has no doubt caused difficulties, but in the interests of the ratepayer the courts have strictly interpreted the limits of the extension beyond legal charity. In fact only three organisations have succeeded in bringing themselves within this paragraph, having been found or conceded not to be within the charity definition.[45] And it is fair to contend on the reported evidence that the few troublesome cases in this respect have arisen not so much because of the fallibility of section 8 (1) (*a*) either in its wording or scope, as interpreted, but because unsatisfactory judgments were given by quarter sessions, and the limits of legal charity are so notoriously ill-defined.

On the other hand, the faults of this paragraph are enough, it is thought, to argue against its permanent retention. At the time when the present paragraph was being debated in the Lords one member moved an amendment to insert "private" between the words "for" and "profit" in the phrase "not established or conducted for profit," his object being to ensure that schools which ploughed back their profits came within the paragraph. On an assurance from the Government that the existing words secured this result, the amendment was withdrawn.[46] Ironically enough, a situation very similar to that feared by the questioner later arose

[44] Quarter sessions cases are reported in *Rating and Income Tax* (R. & I.T.).

[45] *Derbyshire Miners' Welfare Committee* [1957] 1 W.L.R. 764 (Divl.Ct.); [1958] 1 Q.B. 298 (C.A.); *Working Men's Club and Institute Union* [1958] 1 W.L.R. 1135 (Divl.Ct.); *West Ham Boys' and Amateur Boxing Club* (1957) 50 R. & I.T. 413 (Q.S.). In the first of these the Divisional Court left open the question whether the Miners' Welfare Committee was charitable, counsel for the Committee in the Court of Appeal do not appear to have advanced argument on this point, and finally all social welfare work under the Miners' Welfare Act, 1952, was specifically declared charitable by the Recreational Charities Act, 1958. In the second, quarter sessions found that the main object of the Institute was not charitable, and the point does not appear to have been raised in the Divisional Court. In the third, counsel conceded at quarter sessions that the boxing club was not charitable.

There are also two doubtful quarter sessions cases. The court merely said that the Newport Playgoers' Society qualified for relief ((1957) 50 R. & I.T. 149), but in any event this society was clearly charitable in view of *Re Shakespeare Memorial Trust* [1923] 2 Ch. 398. The N.A.L.G.O. Benevolent and Orphan Fund has also been found to come within the paragraph ((1957) 50 R. & I.T. 487), but it is submitted, with respect, that the reported judgment in this case is unsatisfactory.

[46] July 19, 1955: *Parl.Deb., Official Report*, House of Lords, Vol. 193, cols. 835–836.

in *Guinness Trust (London Fund)* v. *West Ham B. C.*[47] The charity in that case was specifically required by its deed to invest surplus income, but with the profits to further with similar work the objects of the charity. The Divisional Court held that the charity was unquestionably conducted for profit, and on that basis failed to qualify under the paragraph. It is true that the decision of the Divisional Court has now been reversed by the Court of Appeal, but the unanimous reversal of a unanimous lower court decision, involving in each case three individual judgments, does not inspire confidence. In any event, there may well be preference for Lord Denning's view that an object is subsidiary "if it is only a means whereby [the organisation's] main objects can be furthered or achieved."[48] And, though it is difficult to see how any amended legislative language can less ambiguously present what one would have thought was already a clear parliamentary intention in this respect, new language there would clearly have to be.

Appreciable difficulty has been experienced with the phrase "whose main objects are," and litigation has shown that this wording is insufficient. What clearly was intended was that organisations whose objects were not exclusively charitable should yet qualify if their main objects came within one or more of the various statutory purposes. However, the Act overlooks the fact that in dealing with charities the courts have distinguished between substantive and ancillary purposes, and have held organisations to be charitable if their substantive purposes are charitable (the ancillary purposes thereby themselves becoming charitable). How then does "main" differ from "substantive"? If there is no difference, then "main" in the Act means nothing, but, if "main" describes but some of the substantive purposes, the remaining substantive purposes are not *ipso facto* main purposes.[49] The

[47] [1958] 1 W.L.R. 541 (Divl.Ct.), overruling the decision of the Recorder in West Ham Quarter Sessions (1957) 50 R. & I.T. 465. See also [1959] 1 W.L.R. 233 (C.A.).

[48] *National Deposit Friendly Society* v. *Skegness U. D. C.* [1958] 3 W.L.R. 172, at p. 187. A similar view is expressed in several quarter sessions judgments.

[49] Vaisey J. appears to have attached identical meanings to "main" and "substantive" in *North of England Zoological Society* v. *Chester R. D. C.* [1958] 1 W.L.R. 1258. The courts have not compared the similarity of main objects and powers with substantive and ancillary purposes. In *Royal College of Nursing* v. *St. Marylebone B. C.* [1958] 1 W.L.R. 94 the Divisional Court emphasised that,

courts appear to have found no distinction, and this is additionally important since it has been held that *all* the main purposes must be exclusively concerned with one or more of the statutory purposes.[50] This means that under paragraph (*a*) only those non-charitable organisations will qualify which can show that all or the remainder of their main objects are within "social welfare." Experience has shown that these are very few.

Nor does the present wording of the section give any guidance as to how the main objects are to be deduced. May the court look to the current activities of an organisation in addition to any original trust deed or written constitution, or is it restricted to those written documents composed in many cases at the date of foundation? The courts are divided on this question, though there is now a greater weight of authority for the view that the latter of those alternatives is the correct practice.[51] On the other hand, there is much to be said for the greater flexibility of the contrary views held by Lord Denning and Devlin J., this being an age when the social revolution has caused many an organisation to change the emphasis or pattern of its work from that conceived at its nineteenth-century foundation. Though, a point which neither of their Lordships canvassed, current activities may change and the particular organisation thereby be exposed to renewed litigation. Which does Parliament prefer—the written constitution, possibly somewhat grandiloquent and archaic, with its certainty,[52] or the Denning-Devlin view with its possible uncertainty?

once the "main objects" have been ascertained, the fact that one such object is ancillary to the others does not render it the less a main object. This reasoning suggests that as a matter of construction "main" is a more comprehensive word than "substantive."

50 *Berry* v. *St. Marylebone B. C.* [1957] 3 W.L.R. 1029 (C.A.).

51 Only in the event of a lack of clarity or an ambiguity or non-existence of a written constitution may current activities be looked at: *Berry* v. *St. Marylebone B. C.* Contrary to the view of the Court of Appeal in *Berry's* case, it is thought that Devlin J. favoured the former practice in *Chartered Insurance Institute* v. *Corporation of London* [1957] 1 W.L.R. 867, at p. 875, and Lord Denning expressed a similar view in the *National Deposit Friendly Society* case, *supra*, footnote 48, at p. 188.

52 This method of interpretation has the peculiar habit of adopting occasionally the approach of the Denning-Devlin interpretation. In *Nottingham Mechanics Institution* v. *Nottingham City Council* (1958) 51 R. & I.T. 681, after quoting the rule in *Berry's* case, Parker C.J. said (at p. 684): "It is enough to say that [the Institution] seems to be run almost entirely as a members' club with very considerable recreational facilities. . . ."

Since the advancement of religion and education are already charitable purposes, the courts have also had difficulty with the phrase "charitable or are otherwise concerned with." The 1955 Act carries no intimation of the meaning which Parliament attached to this phrase, and in fact no reference was made to it in the debates of either House. As Lord MacDermott said in *National Deposit Friendly Society* v. *Skegness U. D. C.*,[53] these non-charitable organisations are clearly required to be "akin to what is charitable," but, "if they fall outside of what is charitable, it is not because they are in conflict with the concept of charity, but because they lack one or more of its characteristics." However, the Act requires that the non-charitable organisation shall be "otherwise concerned with the advancement" of religion, education or social welfare, and the courts have held that "advancement," being a word with a prescribed meaning, brings the non-charitable organisation even nearer to the charitable.[54] An ultimate definition of "social welfare" has rightly been avoided, but, whether or not "social welfare" itself carries the ingredient of altruism,[55] the common charitable factor introduced by "advancement" into the three statutory purposes has meant that only one charitable characteristic may be absent from two, and possibly all three, of those purposes. That characteristic is public benefit. This is not to say that public benefit may be totally absent from the qualifying non-charitable trusts; rather that a concept of public benefit is invoked "wider, no doubt, than the somewhat limited interpretation put on it in the charity cases."[56]

This lesser amount of public benefit has not been defined, and Lord Denning, who must now be considered to have given the

[53] *Supra*, footnote 48, at p. 183.

[54] In the *National Deposit* case Lord Keith merely said (at p. 181): "I attach some importance [to these words]." On the other hand, Lord MacDermott considered "advancement" an "indication of a common factor" (at p. 183) in the three statutory purposes, that factor being an altruistic or benevolent purpose, a desire to do good to others. The latter view was later adopted by the Court of Appeal in *Independent Order of Oddfellows* v. *Manchester Corporation* [1958] 1 W.L.R. 1171, *per* Evershed M.R. Lord Denning thought the word connoted public benefit (at p. 190).

[55] Both Lords MacDermott and Denning respectively found "the attainment of some acceptable standard" (at p. 183) and the element of "doing good for others who are in need" (at p. 190) to be inherent in "social welfare."

[56] *Ibid.*, at p. 189, *per* Lord Denning.

leading descriptive judgment on this matter, was prepared to leave it at this: "There is no need under this section to canvass the cases on what constitutes a section of the community for 'charitable' purposes. . . . Suffice it to reach a conclusion on a general survey of the circumstances." [57] Since Lord Denning thought that "social welfare" itself connotes public benefit,[58] we now have two levels of public benefit, one for charity and another for section 8, with the possibility of a third in "social welfare" itself. Public benefit in charity was itself rendered most uncertain after *I. R. C.* v. *Baddeley* [59]; to introduce other widths of meaning is but to invite, and unreasonably invite, yet more confusion.

Whatever the failings of section 8 (1) (*a*), however, its utilisation as a permanent solution is rendered highly undesirable by reason of the Recreational Charities Act which received the Assent in 1958 just under two months after the Pritchard Committee was appointed. Already it is evident that "social welfare," as defined by the 1958 Act, differs in certain respects from judicial interpretation of the section 8 phrase, "the advancement of . . . social welfare." As previously suggested, "advancement" and "social welfare" are inter-related, and each has lent elements to the resultant meaning of the phrase; nor can it be said that the courts have been unanimous in tracing the source of the different elements of that resultant meaning. Moreover, phraseology used by lower courts to describe "social welfare" in the 1955 Act has been qualified or doubted by higher courts, even after the passing of the 1958 Act, though the qualified or doubted language is used in the statutory definition of the 1958 Act.[60] And, though it is possible that the 1958 Act was not brought to the court's notice, language used in all three judgments in *Nottingham Mechanics Institution*

[57] *Ibid.*

[58] *Ibid.*, at p. 190, second para. In *General Nursing Council for England and Wales* v. *St. Marylebone B. C.* [1959] 2 W.L.R. 308 (H.L.) Lord Keith said (at p. 321): "I cannot accept public benefit as the test of social welfare, though social welfare may be a public benefit."

[59] [1955] A.C. 572.

[60] See *General Nursing Council* v. *St. Marylebone* [1957] 3 W.L.R. 1039, at p. 1048 (C.A.). Also *National Deposit Friendly Society* v. *Skegness*, *supra*, footnote 48, at pp. 182, 183, *per* Lord MacDermott.

v. *Nottingham City Council*[61] is most difficult to reconcile with the terms of the 1958 Act. In these circumstances, with the 1958 Act still upon the Statute-book, to re-enact section 8 (1) (*a*) would be to provide a further setting for the possible evolution of two levels of public benefit, and in this case two degrees of altruism, both relevant to " social welfare."

(b) *Section 8 (1) (c).* A re-enactment of section 8 (1) (*c*) must also be rejected. As it stands[62] this paragraph has let in clubs set up by industrial and commercial organisations for their employees, and in the year 1957–58 almost 20 per cent. of the playing fields eligible under this paragraph were occupied by such clubs. It is highly debatable whether Parliament intended ratepayers to subsidise activities of this sort, and the same doubt arises in relation to the large number of relatively well-to-do private clubs which, through the absence in the paragraph of a social welfare test, have qualified for relief.[63] On the other hand, Cambridge University Rugby Club makes a regular gate charge, but is non-profit making and distributes its resources at the end of the year to Cambridge athletic clubs. Clubs like this do not qualify.[64]

(c) *Section 8 (1) plus the 1958 Act definition of social welfare.* The suggestion has been made that a re-enactment of section 8 (1) be made, but with the requirement that " social welfare " in paragraph (*a*) be defined as in the 1958 Act, and a similar social welfare test be read into paragraph (*c*). Such a solution would be regrettable.

As already argued, the language of paragraph (*a*) is otherwise faulty, and, even if " social welfare " bore a uniform meaning, its

[61] (1958) 51 R. & I.T. 681 (Divl.Ct.). This is the more surprising since the social welfare activities of the 1958 Act are " deemed always to have been charitable," and are therefore within s. 8 of the 1955 Act.

[62] " a playing field (that is to say, land used mainly or exclusively for the purposes of open air games . . .) occupied for the purposes of a club, . . ."

[63] " which is not established or conducted for profit and does not (except on special occasions) make any charge for the admission of spectators to the playing field. . . ." Yachting: *Parkstone Yacht Club* v. *Poole B. C.* (1957) 50 R. & I.T. 509. Golf: see, *e.g.*, *Ladbrook Park Golf Club, Ltd.* v. *Stratford-on-Avon B. C.* (1957) 50 R. & I.T. 91; *Renishaw Park Golf Club* v. *Chesterfield R. D. C.* (1957) 50 R. & I.T. 267. In 1957–58 almost 12 per cent. of playing fields qualifying under this paragraph were golf clubs.

[64] See *The Times*, March 26, 1958.

" advancement " for the purposes of rate relief might well produce further distinctions. Moreover, social welfare in the context of the 1958 Act is " deemed always to have been charitable," [65] which may mean that case-law on the meaning of paragraph (*a*) will not be relevant to a re-enactment. This is particularly so on the question of public benefit, since the 1958 Act adopts the charity level of benefit. On the other hand, there is an argument for the adoption of an amended paragraph (*c*), but, since the 1958 Act makes specific reference to " the provision and maintenance of grounds and buildings to be used for purposes of recreation or leisure-time occupation," [66] the case for such an adoption largely, if not wholly, disappears.

In this field more than any other it is vital to avoid closely paralleled and in part duplicated statutes. There is considerable risk of constructional differences ultimately appearing, and the unnecessary position of the Inland Revenue pursuing the meaning of the 1958 Act and the local authorities the amended and re-enacted section 8 (1). In fact, as section 8 (1) is extensively faulty, any alternative to a fresh statutory definition must be eagerly sought. But, even if a national policy is required and rating relief is therefore to be mandatory, do we need a formula?

(3) *Statutory Exemption for Charities and Discretion for Near-Charities*

Reform of the law of charities, whatever the reluctance of the legislature to grapple with the problem, must come, it would seem, within the foreseeable future. As State control and State subsidy, national and local, demand a national policy, so do they also reveal the inadequacies of the traditional headings of charity.[67] The reduction to State control of hospitals, the introduction of national assistance to relieve want, and the reliance of all levels of education upon governmental support are features of change within the patterns of society, which have both replaced the reduced sources of private benevolence, and released public-spirited effort for work in other fields often brought into being by the social revolution.

[65] s. 1 (1). [66] s. 1 (3).
[67] Poverty, education, religion and the purposes of Statute 43 of Elizabeth I.

If legislative change is to come, then there seems little justification for the adoption in 1959 of yet another formula, modelled on the old, with which to decide the single problem of rate relief. And from this point of view it must be considered a disappointment that, in the terms of reference which it has given to the Pritchard Committee, the Government has seen the rating of public-spirited organisations as a problem which can be solved on its own.[68] Nevertheless, it is at least possible for the law of rating relief to be equated with the present law of charities, and this would pave the way for uniform changes in the whole field of charity.[69] Moreover, an exemption for charitable organisations would give an independence from local authorities, which could prove invaluable in the performance of the advisory role that under the Local Government Act, 1958, will fall to these organisations.[70] It is therefore proposed that there should be a statutory exemption from rates for all charitable organisations, and that non-charitable organisations, however deserving, should be left to the discretion of local authorities.

This solution would at once avoid any new formulation of statutory language for the purposes of rate relief, and also unify the scope of taxation and rate relief.[71] Already the Recreational Charities Act has to be litigated for the purposes of income tax

[68] The present exemption of churches, chapels and their attached halls is not within the terms of reference. The Committee is to consider all other hereditaments occupied for charitable or similar purposes, together with the Scientific Societies Act exemptions. See *supra*, footnote 38.

[69] At present all appeals against the rate are made to quarter sessions under the Poor Relief Act, 1601. Appeal is now much restricted by s. 53 of the Local Government Act, 1948. It is submitted that the uniformity of taxation and rating relief would offer the opportunity for legislation withdrawing the right of appeal to quarter sessions on the issue of charitable status, and the vesting of the sole power to hear such appeals in the High Court. The present writer would oppose the vesting of such power in any existing or future administrative tribunal. Such an arrangement would have to allow for appeal to the High Court on matters of law, and in the law of charities the distinction between fact and law is so very fine that it offers endless opportunities for appeal. This suggested legislation would force impecunious organisations into High Court costs, but the compensation would be a unified body of law for tax and rating relief.

[70] Delegation under ss. 46–51 will require the close relationship of county district councils and voluntary organisations. The working of s. 49 may particularly necessitate the independence of organisations.

[71] Members of both Houses questioned the distinction between the s. 7 exemptions and the s. 8 partial relief. Places of worship are charitable, as are the very great majority of s. 8 hereditaments. The distinction is difficult to justify.

relief, and in any event, though there has yet been no reported litigation upon its meaning, it is probably sufficiently wide in its wording as to bring in the organisations which have hitherto succeeded under "social welfare" in the 1955 Act.[72] The application to the whole of the 1958 Act of the social welfare test will also cut out the recreational clubs exclusive to specific employment, if this excision is not already performed by the Act's requirement of a charity level of public benefit. Whether well-to-do clubs are excluded is a more doubtful question; they may well continue to enjoy those advantages already shared by wealthy charities.[73]

The proposal that near-charitable organisations should be left to local discretion may seem severe, but, if it is subsequently found that deserving bodies are suffering the disadvantages of that discretion, then of necessity the pressure for reform will be directed towards the whole question of charities. But clearly any legislation must do the maximum to prevent as many as possible of the inequalities of discretion. For this purpose it is thought that an amended form of the guiding principles suggested by the Cambridge City Council for the exercise of the discretion should be statutorily adopted.

First, the organisation should not be established or conducted for the ultimate purpose of making profit.[74] Secondly, the organisation should not be financed wholly or in part from public funds either directly or through a Government agency. If an organisation is not charitable and yet receives Exchequer assistance, it would lead to greater consistency throughout the country if it were fully rated each year and such rating were taken into account in the size of the Exchequer grant to the organisation.[75] Thirdly, the

72 Lord Denning's description in the *National Deposit* case of the meaning of "social welfare" in the 1955 Act bears a remarkable similarity to the statutory definition of "social welfare" in the 1958 Act.

73 But the 1958 Act may exclude clubs whose activities are only mainly, and not exclusively, concerned with open-air games or athletics. But what does "recreation or leisure-time occupation" include? And would a regular gate charge be irrelevant under the 1958 Act? It must also be considered highly doubtful whether a "self-regarding" male sports club would succeed under this Act.

74 This would let in the *Guinness Trust* type of case, and the *Cambridge University R. F. C.*

75 The alternative solution leading to consistency would be a statutory exemption or rate reduction, despite the non-charitable character of the organisation. But exceptions breed exceptions, and the present writer would advocate looking again to the definition of charity when these cases of subsidy occur.

main objects of the organisation, as they appear from any written constitution together with the current activities, should be benevolent, philanthropic, or concerned with open-air games or sports. Fourthly, the services of the organisation should be available to the public at large, or a sizeable section of the area community. This would allow the local recognition of organisations which fail to show charitable public benefit, but yet merit assistance for their local value. It also justifies the local authority in excluding those organisations where it considers a selection procedure is over-confining the organisation.

Reimbursement to Local Authorities by Exchequer Grant

The argument has been advanced that, if any organisations are to receive statutory exemption from rates, the Government should grant 100 per cent. reimbursement to the affected local authorities.[76] Now it is true that there is a strong case for repealing section 4 of the Rating and Valuation Act, 1957, because, though by grant that Act at present assists some local authorities who are suffering heavy loss through mandatory section 8 relief, it applies only to authorities receiving equalisation grants, and a similar criticism could be directed against the rate-deficiency grant provisions in the Local Government Act, 1958.[77] But 100 per cent. reimbursement may be going too far. For, though the organisations enjoying relief may be benefiting persons outside the particular local authority area, they may also be relieving the same authority of the necessity of providing some services. For example, the universities at Oxford and Cambridge offer to local residents the extensive facilities of museums, theatre, music and gardens.[78]

Equally clearly, however, some reimbursement must be made to authorities who will lose heavily through possessing within their

[76] Memorandum of Cambridge City Council.

[77] On the purposes of the 1957 Act see the speech of the Parliamentary Secretary to the Ministry of Housing; February 7, 1957: *Parl.Deb., Official Report*, House of Commons, Vol. 564, col. 633. Also see Local Government Act, 1958, ss. 5–7. Rate-deficiency grants are only payable when an authority's rate resources are below the national average.

[78] See correspondence in *The Times*, May 12, 1958.

respective areas a considerable amount of exempt property.[79] On the other hand, to give total relief to some, and deny it to others, would involve drawing an arbitrary line. Any authority, whose exempt rateable values were below a fixed percentage of its total rateable values, would not thereby qualify for reimbursement. This overlooks the fact that only some authorities so affected are in a position to increase their rateable values.[80] How, then, is one to avoid giving 100 per cent. reimbursement, and to draw a line between those authorities who are to be reimbursed and those who are not? [81] The answer may only lie in an Exchequer committee sitting specifically to consider local authority remissions of rate.[82]

Such a committee would also allow reimbursement to be granted where discretionary relief was exercised. This would encourage local authorities to relieve non-charitable organisations which impart limited benefit to their immediate environments, and would guarantee reimbursement for the proportion of relief which has no relevance to local benefit. In any event a 100 per cent. reimbursement for exempt rateable values, itself unfair to the national taxpayer, could hardly be extended to discretionary relief since it could lead to over-generous relief or actual abuse.

[79] *e.g.*, Cambridge City, Westminster City and Eton U. D. C. See *The Times*, May 15, 1958.

[80] See correspondence in *The Times*, May 9, 1958. There is in fact very little difference between the local authorities in the proportion of s. 8 rateable values to total rateable values; county boroughs 1·19 per cent., metropolitan boroughs (including the City) 1·49 per cent., other boroughs 0·93 per cent., urban districts 0·68 per cent. and rural districts 1·13 per cent.

[81] The number of qualifying organisations per local authority would not defeat a formula for reimbursement, but their diversity means a considerable variation from area to area of the degree of local benefit. No ready formula could contend with this problem. However, since on a national average the proportion referred to in the previous footnote is only 1·09 per cent., and that percentage in 1957–58 involved a cost of £2,405,477, the need of a national policy and the desire for local authority independence may justify the Exchequer in reimbursing *in toto*.

[82] It should be possible to consider local authority claims to reimbursement in a manner similar to that set out in s. 1 (5) of the Local Government Act, 1958, with the assurance s. 1 (6) offers of a regular and public review in the House. "The object of [weighting for special circumstances the formula employed for calculating the general grant] is to assure to each receiving local authority a share of the general grant which properly reflects the overall needs of the services and which is adjusted to take account of particular local conditions in so far as they affect local needs": the Minister of Housing, December 9, 1957 (*Parl.Deb., Official Report*, House of Commons, Vol. 579, col. 906). Obversely, losses of rate could be reimbursed to the extent that no local benefit was derived.

Percentage Rate Relief

In order to be in line with taxation relief, rate relief for legal charities should be a complete exemption, but different considerations hold for discretionary relief.

In this respect an Exchequer committee with its national experience would be in a position to represent to local authorities well "out of line" the virtues of raising or lowering particular relief, and this might secure a large measure of national uniformity. But, in the absence of such a committee, a statutory percentage relief for beneficiaries under local discretion has the advantage of securing a certain national uniformity, though there may still be branches of a national organisation enjoying the percentage relief while others obtain none. If introduced at all, however, percentage relief should only be introduced, it is thought, under a simultaneous scheme of some degree of Exchequer reimbursement, for example, a percentage reimbursement of the percentage relief.[83] In the absence of Exchequer reimbursement, percentage relief may well deter local authorities from exercising their discretion, while a percentage relief fixed at a low fraction in order to meet this reluctance will particularly hit those deserving organisations which fail by a narrow margin to qualify as charities.

Conclusion

It has been the prime purpose of this paper to argue that rating relief must be seen against the entire background problem of charity, and charity itself against the background of State subsidy. So that, whatever the ultimate recommendations of the Pritchard Committee, reform of rating relief must surely be a mere stage in an inevitable process of overall reform dictated by social change.[84]

[83] The percentage reimbursement, taken perhaps on a national average, if that is calculable, would allow for local area benefit.

[84] This lecture was delivered and went to press while the Committee was still sitting. On a later occasion the present writer hopes to examine the Committee's recommendations.

THE PERPETUITY RULE

Ernest H. Scamell

The perpetuity rule is a rule or group of rules originally evolved by the courts to solve a particular problem, namely, the problem of how to restrict attempts on the part of landowners to tie up their land in such a way as to secure that it would devolve upon persons in succession over an indefinite period in circumstances in which none of those persons would have any power to dispose of the land.

Historical Introduction

The whole history of perpetuities has followed very much the pattern of a game of snakes and ladders. First, the landowners have achieved their object of tying up the land and then quite suddenly, and usually as a result of the intervention of the courts, their schemes have been broken down. It may seem peculiar at the present day that landowners should especially wish to render their land virtually perpetually inalienable but the reasons stem primarily from the social order of things which prevailed in the Middle Ages and, in particular, from the feudal system.

With the Normans came the universal application of the feudal system with its precast Continental notions of primogeniture, curtesy and dower. Under this system, a limitation of land "to A and his heirs" was originally construed as conferring four different sets of rights: the right to certain services (according to the tenure) from the tenant or grantee was conferred upon the lord or grantor; the right to actual enjoyment of the land was conferred upon the tenant; limited rights of succession were conferred upon the spouse of the tenant (curtesy and dower) and lastly, subject to curtesy and dower, the right to the inheritance on the death of the tenant was conferred upon the tenant's heir, he being regarded as taking by purchase under the original grant and not by descent through his ancestor.[1] Moreover, the word "heir" was strictly

[1] See Fearne, *Contingent Remainders* (6th ed., 1809), pp. 562–569.

limited to descendants—collaterals having no rights of succession.[2] The result of this multipartite division of rights in the land was that a disposition of an estate of inheritance by the tenant was impossible even (originally) with the consent of the lord and the spouse, since until the death of the tenant it was impossible to be certain who would eventually turn out to be the heir and accordingly it was theoretically impossible to obtain a release of the heir's rights. In these circumstances, the tenant could effect no disposition of the land which could be guaranteed to endure for a longer period than his own life and even this amount of freedom of alienation could only be exercised if the consent of the lord was forthcoming. The result was that alienation of land by a tenant was unknown for some time after the Conquest.

The Earliest Perpetuity Rule

During the latter part of the twelfth century, however, two important changes occurred which restored to a considerable extent the pre-Conquest power of alienation and led to the first early forms of settlements. In the first place, the rights of the lord and of the heir, so far as they fettered the tenant's power to alienate his estate in the land, gradually ceased to be considered and it seems that before the end of the twelfth century free alienation of land was possible.[3] Secondly, the narrow meaning originally given to the word "heir" as being confined to lineal heirs was extended by the courts so as to include any collateral heir of the full blood. These developments may together be regarded as the earliest form of perpetuity rule and both aspects were disagreeable to the feudal lords who, on the one hand, became bound to accept as tenant any grantee of the original tenant and, on the other hand, were less likely to recover the land by escheat upon failure of the tenant's heirs. Ways were therefore sought by which the previous situation could be restored and an estate created which could not be alienated and which could only be inherited by lineal heirs.[4] The outcome

[2] See Atherley, *Marriage Settlements* (1813). Not until the Inheritance Act, 1833, could an ancestor inherit as an heir.

[3] See a case referred to by Maitland in (1890) 6 L.Q.R. at p. 24, decided in 1192; and see also Hunter, *Fines*, Vol. I, p. 34.

[4] For a different but unconvincing explanation, see Holdsworth, *History of English Law*, Vol. III (5th ed., 1942), p. 111.

was the adoption in grants of the formula "to A and the heirs of his body," which Maitland has shown was in use before the end of the twelfth century.[5] By this means the desire for inalienability could again be fulfilled.

The Second Perpetuity Rule

So popular did this form of grant become, however, that it was not long before the courts were faced for a second time with the problem of breaking in upon it with its undesirable tendency to concentrate landed wealth in the hands of the few. The courts proved equal to the task and, in contrast to their original attitude, they construed a grant of land "to A and the heirs of his body" as a fee conditional, that is, as an estate of inheritance which could be alienated as soon as issue capable of inheriting had been born (but not before), such birth being regarded as the condition upon the happening of which the fee was to become alienable.[6] This, therefore, may be regarded as the second of the early perpetuity rules.

For a time this second rule was accepted but its effects off-set so far as possible by resorting to a limitation of land "to A for life and after his death to A's eldest son and the heirs of his body" which (at a later date) would be followed by successive remainders for A's second and other sons according to seniority and the heirs of their respective bodies.[7]

At the same time, however, this second perpetuity rule was provoking an outcry from the landed proprietors who regarded the construction as in direct conflict with their manifest intentions.

[5] (1890) 6 L.Q.R. 24; Hunter, *Fines*, Vol. I, p. 34.

[6] Though not entirely absolute, for if the grantee in fact made no disposition and died without issue, the land would revert to the grantor and would not pass to collateral heirs: see Atherley, *Marriage Settlements* (1813); Fearne, *Contingent Remainders* (1809); Pollock and Maitland, *History of English Law* (1923). *Contra*, Holdsworth, *op. cit.* (Vol. III, p. 113), citing Bracton. This illustrates that the courts desired to make no greater inroads upon the incidents of settled estates than was absolutely necessary in the interests of alienability and if the result was not entirely logical, it was at least practical. Indeed, it might be said that the courts in this respect were unwittingly ahead of their time in recognising power to dispose of the fee simple divorced from its ownership: see Sugden, *Powers* (8th ed., 1861), at p. 199.

[7] See *Thomas Weyland's Case* (1278) Rolls of Parliament i, 66, cited by Maitland in his article "Remainders after Conditional Fees" (1890) 6 L.Q.R. 24.

Their dissatisfaction was duly recorded in chapter 27 of the Petition of Oxford, presented in 1258,[8] and the ultimate outcome was the passing of the first chapter of the Statute of Westminster II, commonly known as the Statute De Donis Conditionalibus. This provided that where land held in free tenure[9] was limited by reference to the formula "to A and the heirs of his body," the grantee should be unable to transfer any greater estate than an estate for his own life.

It looked, therefore, as if this statute had restored the old order of things and made it possible once again to secure the perpetual devolution of land along the line of the grantee's descendants. This, in fact, was the ultimate conclusion to which the courts (for a time) resigned themselves but not before certain gallant attempts had been made to restrict the operation of the statute. Thus, there is some authority to show that the statute was at first construed as prohibiting only alienation by the original grantee so that no fetter on alienation would attach to the estate in the hands of the first and successive heirs of the body of the grantee.[10] In the reign of Edward II, Bereford C.J. held that the statute was intended to bind the estate until it came into the hands of a great-grandchild.[11] But in the reign of Edward III, it was finally conceded that the prohibition extended to all heirs of the body without limit.[12] From this time, therefore, the estate which had become known as the fee tail was, for the time being, free from any rule of perpetuity.

The Third Perpetuity Rule

It was not long, however, before the dangers of this inalienability were seen and petitions were presented to Parliament for the repeal of the statute *De Donis*. Parliament refused to act, however,

[8] See *Select Charters*.
[9] The statute did not apply to copyholds.
[10] See Y.BB. 5 Edw. II (S.S.) (1311–12), 177, *per* Scrope, *arguendo*; 5 Edw. II (S.S.) (1312), 225, *per* Scrope and Herle, *arguendo*; 4 Edw. III Trin.Pl., *per* Shardelow, *arguendo*.
[11] Y.B. 5 Edw. II (S.S.), pp. 177, 225. It is interesting to note that the judge came to this conclusion on a ground which would today be regarded as *almost* heretical, namely, that the draftsman had negligently omitted to insert such a provision.
[12] See Y.B. 20 Edw. III (R.S.), Vol. II, p. 202.

and for the third time it was left to the courts to devise a means of turning the tables. This they eventually succeeded in doing by permitting a tenant in tail to bar the entail and dispose of the fee simple estate in the land by suffering a common recovery. This right was recognised at least as early as 1472[13] but it probably existed a good deal earlier,[14] and could not be excluded by express provision.[15]

Nature of these early Perpetuity Rules

It will be seen that all the above-mentioned rules against perpetuity were rules specifically aimed at preventing the suspension of the power of alienation of estates of inheritance. None of these rules actually made any interests prospectively conferred by a grant void *ab initio* but only avoided them if and when any disposition of the land was actually made. This is important, as in this respect these older rules differ in nature from the more modern rules.

Rules Affecting the Initial Validity of Interests in Land

(1) After all attempts to create an inalienable fee simple or fee tail had thus failed landowners turned their attention to the possibilities afforded by the creation of a series of life estates. Thus, if Blackacre could be limited to A for life with remainder to A's first unborn son for life with remainder to that unborn son's first son and so on *ad infinitum*, the result would be that Blackacre would be tied up for an indefinite period for the benefit of a series of life-tenants, none of whom could dispose of anything more than the life estate which was vested in him. In theory, there seems no reason why the fictitious process of the common recovery could not have been applied to such a situation as this so as, in effect, to confer upon the tenant for life for the time being entitled in possession the power to dispose of the whole fee simple and to extinguish the estates of the tenants for life in remainder

[13] In the famous *Taltarum's Case* (1472) Y.B. 12 Edw. IV, Mich.Pl. 25.
[14] See H. W. Elphinstone, "Notes on the Alienation of Estates Tail" (1890) 6 L.Q.R., p. 180.
[15] *Mary Partington's Case* (1614) 10 Co.Rep. 35b.

so that all the estates would in the first instance be valid. The courts, however, preferred to adopt an entirely fresh approach and they dealt with the problem by declaring that any and every remainder limited after a remainder to an unborn person should be void.[16] This later became known as the rule in *Whitby* v. *Mitchell*.[17] The result was that after the death of the first unborn remainderman the land reverted to the grantor and so became freely alienable in his hands.

(2) Of a similar character to this rule is the rule which was later devised to cope with the situation which had arisen as the result of the recognition by the courts of legal executory interests in the nature of springing and shifting uses. These had come into existence as the direct (but seemingly unintended) result of the Statute of Uses, 1535. By means of such interests it would have been possible, had no limit been imposed by the courts, to have imposed a virtually perpetual fetter on alienation.

Three methods of restricting the operation of these executory interests appear to have been open to the courts. First, they might have extended the application of the fiction of the common recovery as applied to the fee tail and given the owner for the time being in possession of a limited interest power to dispose of the fee simple for his own benefit. Secondly, they might have applied a rule analogous to the rule in *Whitby* v. *Mitchell* and laid down that interests which followed certain other interests should be void; or, thirdly, they might have laid down that all executory interests in expectancy should be void unless they vested in an ascertained person within a certain specified period.

In fact, the courts never considered the first alternative at all, but after wavering for a time between the second and third alternatives[18] eventually decided in favour of the latter in the celebrated *Duke of Norfolk's Case*.[19] The precise length of the period and conditions upon which executory interests were required to vest were only finally determined by the decision of the House

[16] See *Perrot's Case* (1595) Moore 368.
[17] 44 Ch.D. 85. See *Re Nash* [1910] 1 Ch. 1. The rule was abolished by s. 161 of the Law of Property Act, 1925.
[18] See *Child* v. *Baylie* (1618) Cro.Jac. 459.
[19] (1685) 3 Ch.Cas. 1.

of Lords in *Cadell* v. *Palmer*,[20] and the rule, as afterwards extended to legal [21] and equitable [22] contingent remainders, has been formulated as follows: "Where the vesting of any interest in property, whether legal or equitable, is postponed for a period exceeding a life or lives in being at the date of the instrument creating it, or where the disposition is a will, at the death of the testator, and twenty-one years after the expiration of such life or lives, such interest is void." [23]

Raison d'Être of the Modern Rule against Perpetuities

By reason of this changed attitude of the courts towards perpetuity the question may well be asked, what is the true *raison d'être* of the modern perpetuity rule? Is it simply another way of securing that the power of alienation shall only be held in suspense for a limited period or is it intended (as the content of the rule implies) to prevent the grantor from controlling for an unduly long period the beneficial enjoyment of property?

The answer to this question is, it is submitted, important because upon it might well depend the lines of possible reform. Thus, if the true purpose of the rule is to ensure that property shall not remain inalienable for longer than the perpetuity period, then having regard to the powers now conferred by the Settled Land Act, 1925, the Law of Property Act, 1925, and the Trustee Act, 1925, upon tenants for life and trustees of property, there would seem to be little further need for the rule, since settled property is in fact now freely alienable under the provisions of those statutes. Thus, in the case of settled land, the tenant for life for the purposes of the Settled Land Act has all the powers conferred by that Act, including the power of selling the settled land.[24] Equally, a trustee of a fund of personalty, such as shares in a limited company, usually has power to transpose investments and for that purpose can at any time sell the investments constituting the trust fund and reinvest the proceeds. Thus, even if the trust

[20] (1833) 1 Cl. & F. 372.
[21] *Re Ashforth* [1905] 1 Ch. 535.
[22] *Abbis* v. *Burney* (1881) 17 Ch.D. 211.
[23] See *Cadell* v. *Palmer*, n. 20, above, and the reporters' notes to that case.
[24] s. 38 of the Settled Land Act, 1925.

could last indefinitely, there would at the present day be no question of the trust property being removed from the sphere of commerce.

In connection with this question it is interesting to speculate upon whether the modern perpetuity rule would ever have been invented (at any rate in its present form) had settlements of the pre-1681 era conferred upon each successive limited owner power to dispose of the fee simple in a way similar to that later made possible (indeed obligatory) by the Settled Land Act, 1882. By virtue of the operation of the Statute of Uses, 1535, it was certainly possible for such powers to be conferred upon limited owners, but the early precedent books show that this was rarely done in practice.[25]

It would seem that the original object of the modern perpetuity rule was in fact primarily to prevent land being rendered inalienable and support for this view is provided by the courts' attitude to remainders limited after a fee tail which were early held to be free from the perpetuity rule on the ground that by reason of the tenant in tail's power to bar the entail and dispose of the fee simple, they in no way fettered the free alienability of the land.[26] Further, as late as 1879, Fry J. said of the perpetuity rule[27]: "The rule is aimed at preventing the suspension of the power of dealing with property—the alienation of land or other property. But when there is a present right of that sort, although its exercise may be dependent upon future contingency, and the right is vested in an ascertained person or persons, that person or persons concurring with the person who is subject to the right can make a perfectly good title to the property." This attitude seems to have been accepted by the courts in relation to determinable interests in property, for notwithstanding that the beneficial enjoyment of the property as a whole may thereby be controlled for a longer period than that permitted by the perpetuity rule, such interests, together with the possibilities of reverter expectant thereon, have been

[25] Occasionally, powers of leasing were conferred, but usually only where the tenant for life was also the settlor: see Sir Orlando Bridgman's *Select Precedents* (5th ed., 1725), pp. 196–211.

[26] See *Nicolls* v. *Sheffield* (1787) 2 Bro.C.C. 215.

[27] *Birmingham Canal Co.* v. *Cartwright* (1879) 11 Ch.D. 421, 433.

held to be free from the rule both as respects realty[28] and personalty.[29]

Unfortunately, however, this view has not been consistently adopted by the courts and in modern times has been expressly refuted by the Court of Appeal in *London & South Western Ry.* v. *Gomm*,[30] where it was held that an option unlimited in point of time to purchase a fee simple was void for perpetuity in so far as it created an equitable interest in the land. Yet, as in the case of a determinable fee, it is possible to say of the fee simple owner and the option owner together that they could between them make a good title to the property. The same might be said of an owner of a fee simple upon condition and the person entitled to the right of re-entry yet here again, most rights of re-entry are subject to the rule.[31] Again, the perpetuity rule has been applied to cases where no question of the remote creation of future interests is involved but where the corpus of the trust fund is required to be retained by the trustees and the income only applied for specified non-charitable purposes. Thus, a gift of land to be used in perpetuity as a family burial-ground is void,[32] but would be valid if limited to a period not exceeding the perpetuity period.[33] There is no general agreement between writers as to the true basis of this application of the perpetuity period,[34] but if, as has often been suggested, it is to secure that the property shall not be inalienable, then prima facie the rule would not apply if powers of sale were conferred upon the trustees either expressly or by statute. It seems highly doubtful, however, if this would be the case. Here, it would seem that the basis of the application of the rule is that the grantor should not be permitted to exercise a posthumous and indefinite control over the enjoyment of property, in which case

[28] *Re Cooper's Conveyance* [1956] 1 W.L.R. 1096; *contra*, *Hopper* v. *Liverpool Corporation* (1944) 88 S.J. 213, which, however, seems to have been wrongly decided on this point.

[29] *Re Chardon* [1928] Ch. 464.

[30] (1882) 20 Ch.D. 562.

[31] See *Re Hollis and Hague's Contract* [1899] 2 Ch. 440; Law of Property Act, 1925, s. 4 (3).

[32] *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381.

[33] *Re Hooper* [1932] 1 Ch. 38.

[34] See the discussion and authorities referred to in Nathan's *Equity through the Case* (3rd ed., 1955), pp. 251–252.

the presence of powers to sell would not affect the application of the rule.

Of even greater regret, however, is the fact that in several cases the courts appear to have applied the rule to a given situation without considering whether that situation is within either of the above suggested (or any other) mischiefs which may be regarded as having given rise to the rule. Thus, in *Re Allott*,[35] a power of leasing conferred upon trustees which might have been exercised outside the period was held to be void although the power neither prevented (but rather promoted) alienation nor constituted a fetter on the beneficial enjoyment of the property.[36] It is submitted that a determination of and consistent regard for the *raison d'être* of the rule is vital if the rule is to be (or become) a good servant rather than a tyrannical master and for this reason both the approach and the decision in *Re A. E. G. Unit Investment Trust, Ltd.*[37] should, it is submitted with respect, be welcomed. In that case Wynn-Parry J. held that a provision in a unit trust investment scheme for the indefinite accumulation of income was not within the mischief of the statutory rules restricting the accumulation of income and that accordingly such rules did not apply.

The Recommendations of the Law Reform Committee

If the view which has been expressed above has any validity, it is disappointing to find that in making their recommendations in November, 1956,[38] the Law Reform Committee did not even stop to consider the original *raison d'être* of the rule against perpetuities or whether it had ceased to exist but assumed that the current basis of the rule was the necessity for placing some time limit on the vesting of future interests,[39] and treated as a separate rule the attitude of the courts towards perpetual trusts for non-charitable objects.

35 [1924] 2 Ch. 498.
36 See also *Re Daveron* [1893] 3 Ch. 421.
37 [1957] Ch. 415.
38 The Fourth Report (1956), Cmnd. 18.
39 *Ibid.*, para. 4: "Granted the necessity for placing some time limit on the vesting of future interests, which we take to be beyond argument, the foremost matter for examination is the length of the permitted period."

The general conclusion reached by the Committee is that (with four exceptions) the perpetuity (or in some cases a shorter) period should be retained for restricting the remote vesting of interests and extended so as to embrace the remote duration of interests. Thus, it is recommended that possibilities of reverter expectant upon determinable interests in property should be subject to the rule.[40] The four proposed exceptions are: (a) an option contained in a lease enabling the lessee for the time being to purchase the freehold or other superior interest,[41] (b) a perpetual trust of a limited sum of money (such as £1,000) to use the income for the maintenance of any grave, tomb or monument,[42] (c) all rights of re-entry exercisable in respect of a rentcharge,[43] and (d) administrative powers of trustees ancillary to a subsisting trust.[44] With these exceptions, therefore, the principle which appears to underlie the Committee's recommendations is that posthumous control over the enjoyment of property should not be permitted beyond a certain period whether or not that control would result in any restriction on the alienation of the property.[45]

The Committee's Specific Recommendations

It is not proposed, nor would it be possible within the scope of this paper, to consider individually all the reforms to the perpetuity rule proposed by the Law Reform Committee, but their proposals may be considered generally under the following heads:

(1) Recommendations affecting the detailed operation of the rule. Very briefly, the following recommendations are made:

(a) That no change in the period prescribed by the rule is in general required but that as an alternative to the present period, it should be possible for the instrument creating the limitation to specify a period of years not exceeding eighty.[46]

[40] *Ibid.*, paras. 39 and 41.
[41] *Ibid.*, para. 37. Such an option is at present subject to the rule: *London & South Western Ry.* v. *Gomm* (1882) 20 Ch.D. 562.
[42] *Ibid.*, para. 53. See *Re Dalziel* [1943] Ch. 277.
[43] Cmnd. 18, para. 43.
[44] *Ibid.*, para. 34.
[45] In fact the actual length of that control may exceed the perpetuity period as where a contingent life interest in favour of an unborn person is limited to vest at the very end of the period; the trust would nevertheless continue during that subsequently born life.
[46] Cmnd. 18, paras. 5–9.

(b) That the validity of a limitation under the rule should not depend upon the facts which *may* occur but on the facts which do in fact occur; the principle should be "wait and see." [47]

Both these proposals should be universally acceptable; for their implementation would result in the use of fewer drafting devices and the frustration of the intentions of fewer testators.

(2) Recommendations concerning options, possibilities of reverter and rights of re-entry:

(a) Options. It is recommended that options conferred by a lease upon the lessee for the time being to purchase the freehold or other superior interest should be wholly exempt from the rule [48] whilst any other option to acquire an interest in land should be valid and exercisable for a period not exceeding twenty-one years.[49]

(b) Possibilities of reverter. It is recommended that the present somewhat uncertain position should be resolved in favour of applying the rule to possibilities of reverter and it is concluded that once the possibility of reverter has become void "the determinable fee will become absolute." It is submitted with respect, that it is not entirely clear that this result would, in the absence of express provision, follow. It would appear to be arguable that on the happening of the specified event outside the period, the determinable interest would come to an end and, the possibility of reverter being void, the property would go to the Crown as *bona vacantia*. This difficulty could, however, be avoided by an express provision that once the possibility had become void the interest upon which it was expectant should become absolute.

A second criticism of much greater moment which might be directed to the Committee's proposals in this connection is that so far as land is concerned such proposals

[47] *Ibid.*, paras. 15–23. See also the detailed proposals for dealing with certain specific cases (*e.g.*, presumptions against fertility) contained in paras. 11–14 and 25–33.

[48] *Ibid.*, para. 37.

[49] *Ibid.*, para. 38.

would appear to overlook that a grantor, denied of the right of creating an indefinite determinable fee, would yet still be able to give substantial effect to his intentions by means of a determinable lease. Thus, a demise of land "to X for 999 years so long as X and the heirs of his body shall from time to time reside on the premises" or a demise "to the Y Corporation for 999 years so long as it shall maintain the grantor's grave" would continue to operate (as they do under the existing law) to create determinable interests where the determining events would remain valid throughout the whole term. Furthermore, by reason of the definition of "term of years absolute" contained in the Law of Property Act, 1925,[50] the land would not be settled land and could accordingly not be freed from the restrictions.[51]

It may well be that the time has arrived when more attention ought to be given by the legislature to the anomalies which exist as between freehold and leasehold estates in land for whatever contrast in value or desirability may at one time have existed between the two forms of estate, it is clear that long leases are at the present day equally as attractive (apart from several special advantages they enjoy) as the fee simple estate.

(c) Rights of Re-entry. Here it is recommended by the Committee that the present uncertainties should be statutorily dispelled.[52] Here again, however, much of what has been said above in connection with determinable leases applies with almost equal force to leases subject to a right of re-entry, such rights of re-entry being entirely free from the perpetuity rule.

(3) Accumulations. A very welcome recommendation and one which it is hoped will be early acted upon is that proposing that

[50] s. 205 (xxiv).

[51] For the purposes of s. 146 of the Law of Property Act, 1925, such a lease might take effect as determinable by proviso for re-entry on the happening of the event (see s. 146 (7) of the Act) but this would not seem to affect the position of such a lease generally.

[52] Cmnd. 18, para. 43.

two additional periods be added to the existing four periods[53] during which accumulations of income are permissible, namely, (a) twenty-one years from the date of a settlement *inter vivos* and (b) the minority or respective minorities of persons living or *en ventre sa mere* at the date of a settlement *inter vivos*. At the present time these periods apply only in relation to wills, with the result that an unduly severe restriction is imposed on accumulations of income derived from a settlement made *inter vivos*. A further difficulty which used to arise in connection with the permitted periods of accumulation in relation to the incidence of income tax on trust income as between a settlor and a beneficiary who is the child of the settlor has now been dealt with by section 20 of the Finance Act, 1958, before the passing of which there was much to be said for an alteration in the law so as to permit accumulations for a maximum period of twenty-two years.

Conclusion

The perpetuity rule has had a somewhat chequered career and is at present due for a thorough overhaul. In so far as they go, the recommendations of the Law Reform Committee seem, for the most part, admirable. What the Committee appears to have done, however, is to confine its attention to the law as it has in fact been applied in the decided cases without considering the rule against a wider background and, in the result, it has not necessarily considered all the anomalies which in fact exist. It is submitted that the time is ripe for a thorough reconsideration of the whole of the law of property and the inter-relation of different doctrines, of which the perpetuity rule is one, to each other.

[53] See s. 164 of the Law of Property Act, 1925.

CRIMINAL APPROPRIATION

S. Prevezer

The first major subject to be referred to the newly appointed Criminal Law Revision Committee is "the law of larceny and kindred forms of fraud," [1] and anyone familiar with this subject will know that it deserves its high priority. Even at this early stage, it is clear that the Committee has two general alternatives open to it: either to take a long-term view and recommend that this branch of the criminal law be systematically reshaped, as has recently been attempted by the American Law Institute in its Model Penal Code [2]; or, at least, to recommend that the more glaring defects be at once eliminated by *ad hoc* legislation.

Despite the greater difficulties which it would entail, it is to be hoped that the former course will be followed, for it is clear that the common element in such offences as larceny, obtaining by false pretences, robbery, "blackmail," receiving, embezzlement and fraudulent conversion, namely, the appropriation, or at least attempted appropriation, of personal property without the free and unmistaken consent of the victim, furnishes an obvious basis for a unified system. Yet these offences are for the most part traditionally distinct from one another, however much they may sometimes overlap in practice. Some are distinguishable by being defined in terms, not of an appropriation or attempted appropriation of property, but of an interest in property such as ownership or possession, although the separation of such offences as larceny by a bailee and fraudulent conversion, or larceny by a trick and obtaining by false pretences, is really only of historical significance and is quite impossible to justify today. Some are distinguishable by reason of being defined with reference to an *actus reus*, such as a taking and

[1] The appointment of the Committee, and the first subjects for its consideration, were announced by the Home Secretary in a White Paper presented to Parliament on February 2, 1959, and entitled "Penal Practice in a Changing Society," Cmnd. 645.

[2] See further Prevezer, "English Criminal Law Reform and the American Model Penal Code," Vol. XI of this *Annual* (1958), p. 62.

carrying away, an embezzlement or a receipt, which has acquired a particular esoteric meaning, though the effect with regard to the property is substantially the same in each case. Similarly, many are distinguishable by reason of being defined with reference to a particular form of *mens rea*, such as an intent permanently to deprive, an absence of claim of right or simply an intent to defraud, though diversity of mental element is particularly difficult to justify in this branch of the criminal law. Sometimes, admittedly, it transpires that the diversity is more of form than substance; thus, for example, it has recently been affirmed that a claim of right is a good defence to a charge of fraudulent conversion,[3] bringing the offence, therefore, more into line with larceny and crimes of stealing, although there is no need to prove an intent permanently to deprive in fraudulent conversion, as there is in the latter group of offences. In some cases, no *mens rea* is required in the subjective sense of the term, but merely an absence of reasonable cause for the conduct of the accused,[4] whereas in others the exact significance of an undoubted requirement of subjective *mens rea* is still open to doubt. Thus, although it is clear in receiving that guilty knowledge must be accompanied by guilty intent,[5] the precise nature of that intent has yet to be identified, and even the requirement of guilty knowledge has recently been shown to be extremely problematical.[6]

In any event, there is hardly the space in this paper to discuss most of the problems which this branch of the criminal law will present to the Committee, but it may at least be opportune to consider a few of the difficulties which have arisen in recent cases in the context of larceny, which accounts each year for approximately two-thirds of all the indictable crimes known to the police.[7] Before doing so, however, it may be helpful to say something of

[3] *R.* v. *Lyon* [1959] Crim.L.R. 54.

[4] See particularly Larceny Act, 1916, s. 29 (1) (i).

[5] *R.* v. *Matthews* (1949) 34 Cr.App.R. 55.

[6] See particularly *D. P. P.* v. *Nieser* [1958] 3 W.L.R. 757.

[7] See further the *Criminal Statistics for England and Wales* (1956) (Cmnd. 286). The relevant figures for 1957, announced by the Home Secretary on July 31, 1958, disclose that crimes of larceny increased in the year by 11·6 per cent. compared with an average overall increase for all indictable offences of 13·7 per cent.

the origins of the offence in this country; for the distinctions which separate the individual offences and, in particular, the peculiar anachronistic features of the crime of larceny are only explicable "in terms of a long history of expansion of the role of the criminal law in protecting property," [8] which began with a concern for protection against violent seizure and has gradually developed to cover more subtle and devious forms of dishonest appropriation.

Origins of Larceny

Although the earliest English definitions of the crime, those of Glanville, Bracton and other feudal writers, to which so much of the present law is directly traceable, were undoubtedly modelled on the civil law definition of *furtum* in the *Institutes* and the *Digest*,[9] it is apparent that the concept of *furtum* in the two systems was radically different. The Roman offence involved, in essence, an interference with ownership rather than possession, though the action could be brought by anyone with an *interesse* in the property. It was committed by a *contrectatio*, a touching or handling, and it was, therefore, irrelevant that the accused had converted the property after an initial lawful receipt.[10] Although it is uncertain what exactly was meant by the phrase, *furtum* could be committed of the "use and possession" of property, and practically any form of property which was already movable, or could be made movable, might form the subject-matter of the offence.[11]

English law, on the other hand, at this stage knew little of a refined concept like ownership, and its offence was designed to fit into the existing structure of possessory remedies, involving an interference with possession and not ownership. Although the term *contrectatio* was employed by both Glanville and Bracton,[12] it soon

[8] Appendix A to Art. 206 of Part II in Tentative Draft No. 1, *American Law Institute's Model Penal Code*, at p. 101.

[9] *Furtum* is defined in the *Digest* (XLVII. 2. 1. 3): "*Furtum est contrectatio rei fraudulosa, lucri faciendi gratia, vel ipsius rei, vel etiam usus ejus possessionisve, quod lege naturali prohibitum est admittere.*" For Bracton's definition, see note 12, below.

[10] See particularly the discussion of the meaning of *contrectatio* in Jolowicz, *Edition of Digest*, XLVII. 2, *De Furtis* (1940), pp. xvii–xxv.

[11] *Ibid.*, xv–xvii.

[12] Bracton's definition was "*contrectatio rei alienae fraudulenta cum animo furandi, invito illo cujus res illa fuerit.*"

came to signify a taking, an asportation out of someone's possession, an interpretation which was mainly due to the close historical connection of the offence with the quasi-criminal action of trespass, but was also, perhaps, partly due to the old Anglo-Saxon concept of theft, which was primarily concerned with the suppression of cattle-lifting. Thus, Pollock and Maitland, despite ascribing the common law of theft wholly to Norman influences, nevertheless concede that "the 'taking and carrying away' upon which our law insists had been from the first the very core of the English idea of theft." [13]

Unfortunately, whilst this was perhaps sufficient for a primitive society guarding against wrongful appropriation in its simplest forms, it was clearly inadequate to meet the demands of a more civilised community, for which the Roman conception of *contrectatio*, wide enough to cover the acts of such persons as dishonest bailees and servants, would have obviously been more appropriate. Moreover, the English offence, even in its early stages, could only be committed in respect of certain restricted types of movable property, and required not merely an intent permanently to deprive the possessor, but also that such intent should have existed at the moment of the unlawful taking. The precise origins of these requirements, particularly of the last, are by no means beyond doubt, but it is reasonably certain that to a large extent they sprang from an early desire on the part of the judges to restrict the scope of an offence which, in feudal times, was already usually punishable with death; for the distinction between grand and petty larceny, which was firmly established by Edward I's reign and lasted until 1827, was apparent even in the laws of Aethelstan in the early part of the tenth century.[14] Indeed, the severity with which theft was formerly punished in this country does much to explain the vast differences of interpretation of Bracton's definition of *furtum* and that of the authors of the *Institutes* and the *Digest*, who conceived of the offence primarily as a civil wrong, although certain forms had long been punishable *extra ordinem*.[15] These

[13] *History of English Law*, Vol. II (1893), p. 497.
[14] See Attenborough, *The Laws of the Earliest English Kings* (1922), p. 127.
[15] Thus Stephen states: "Perhaps, as the severity of the common law led to the various subtleties by which its operation was so much restricted, the principle

early restrictive features of the English offence, which for the most part have been preserved long after their *raison d'être* has disappeared, provide the source of most of our present problems; for, in the absence of any general legislative remedy, it has fallen to the courts to try to overcome the inadequacies of the law of larceny by methods which, in the long run, have proved inadequate and have given rise to further difficulties.

Development by Fictions

That these restrictive features have, generally, been preserved is evident from the current definition of stealing in section 1 of the Larceny Act, 1916, which consolidates previous common law and statutory provisions: "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof." Whilst the proviso to the section, to the effect that a bailee or part-owner may steal by fraudulently converting the goods, confirms the partial removal in 1857 of an important common law restriction, and some of the terms are meant to be clarified by the subsequent provisions of the section, it is evident that the interpretation of the courts often bears little relation to the words used by the legislature.

Inevitably, many of the problems arising out of this definition turn on the general requirement that the *animus furandi* must exist at the time of taking, for it is this requirement which is most at variance with common conceptions of dishonesty. Although there is a natural inclination to be more charitable to the person who begins honestly and only subsequently succumbs to temptation than to the person who is dishonest from the outset, this provides no justification for exempting the former from all criminal liability. The proper method of showing clemency, if such is warranted by the full facts of the case, is to impose a light sentence. Since the existing law has proved unsatisfactory in this respect, the courts

that theft was in modern cases only a civil injury may have led the Roman lawyers to extend the definition of it" (*History of the Criminal Law of England*, Vol. I (1883), p. 31).

have often made new law rather than let obviously dishonest persons escape.

(a) *Custody and Constructive Possession*

The first steps were taken to deal with dishonest servants who were said, while acting in their official capacity, not to acquire legal possession of property entrusted to them by their masters until they formed an *animus furandi* and converted the property.[16] Until then, they had only what was called custody, a convenient term to describe an obvious fiction.[17] Whilst this fiction was perfectly consistent with the principle that larceny involved an interference with possession, it inevitably gave rise to other problems and made it difficult, logically, to protect the interests of honest servants against dishonest third parties. Clearly, if the custodian of property in England possessed by someone in France was forcibly deprived in this country, it was ridiculous to allege that the offence had been committed against the latter, particularly as the assault had been made on the former.[18] It was, therefore, necessary to hold that one could steal from a person who had merely custody, and this conclusion was ratified by section 1 of the Larceny Act, 1916, which, while stating that the taking must be without the consent of the owner, then explains that the term "owner" includes "any part owner, or person having possession or control of, or a special property in" the thing taken. Thus larceny, whilst essentially an offence against possession, is defined in terms of ownership, although ownership is said not to mean ownership but part-ownership, possession, control or special property. In any event, the fiction of custody was obviously useful before 1857 when dishonest bailees could, generally, only be punished if, by another curious fiction, they terminated the bailment

[16] A similar attitude was soon adopted towards guests, bailiffs and certain other persons. See further *R.* v. *Chisser* (1678) T.Raym. 275; *R.* v. *Thompson* (1862) L. & C. 225.

[17] A distinction was at first drawn between the servant with mere access to the goods in the home and the servant who was allowed to take the goods away from the premises. The latter was originally said to have legal possession and was not punishable until a statute was passed in 1529 (21 Hen. 8, c. 7).

[18] See further 46 L.Q.R. (1930), 135, and the criticism of the decision in *R.* v. *Harding* (1929) 21 Cr.App.R. 166.

by breaking open the property, a rule which was hardly appropriate if there were no breaking, perhaps because the property was not breakable.[19]

When in 1857 a general provision was introduced to cover bailees, the fiction of custody might perhaps have become largely superfluous, but once the distinction had been drawn between factual and legal possession, it was not to be lightly discarded and it constantly recurs in modern cases in reasoning which must be quite baffling to the layman. For example, in *Williams* v. *Phillips* in 1957,[20] dustmen were charged with stealing scrap metal which they had taken from dustbins emptied by them in the course of their duties, despite earlier warnings by the corporation against appropriating refuse. It was held by the Divisional Court that until the refuse was removed from the dustbins, it remained the property of the householders. Once, however, it was put into the dustcart, it fell into the constructive possession of the corporation even though the dustmen had complete control over the contents of the cart.

The technicality of this branch of law is well illustrated by the fact that if the refuse had been appropriated without being put into the dustcart, the offence committed would then have been embezzlement and not larceny by a servant since the dustman would have had at least legal possession of the property.[21] Even though, admittedly, the two offences are closely related and a person may be charged with the one and convicted of the other,[22] the distinctions which separate them are not unimportant. For example, larceny requires an intent permanently to deprive whereas embezzlement does not. Similarly, the wrongful intent in larceny by a servant must exist, technically at least, at the time of taking possession, although this is not the case in embezzlement.

19 For the most illuminating discussion of *The Carrier's Case* (1473) Y.B. 13 Ed. 4, f. 9, Pasch. pl. 5, see Hall, *Theft, Law and Society* (2nd ed., 1952), Chap. 1.

20 41 Cr.App.R. 5.

21 It would probably also have been larceny by a bailee. In many cases the two are alternative. Larceny by a bailee can, however, hardly be appropriate where the servant is believed by the third party to be the principal, *e.g.*, where he goes to change his master's five-pound note at a strange bank and then absconds with the change.

22 Larceny Act, 1916, s. 44 (2).

(b) *Possession of Lost Property*

In a situation like that occurring in *Williams* v. *Phillips*, one of the problems, therefore, is that of conferring possession on the person from whom it is alleged the property has been stolen. This same problem arises when the property has been lost and is then taken by the finder. Here, it is deemed for the purposes of larceny to remain in the possession of the owner although, as Buckland and McNair remark: "Actually [it is] not in anybody's possession and to attribute possession to the owner is really only to say that for such cases the doctrine of taking out of possession is not to apply." [23] This fiction is impliedly affirmed by the provision in the Larceny Act, 1916, that "the expression 'takes' includes obtaining the possession by finding where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps." [24]

The problem, however, is much more difficult when the property is abandoned, as distinct from lost, for section 1 (3) requires, *inter alia*, the thing to be the property of some person for it to be capable of being stolen. Nevertheless, rather than allow every finder of abandoned property to escape unpunished, however reprehensible his intent, the Divisional Court has held in *Hibbert* v. *McKiernan* that if the property is discovered on private land, the landowner's intent "to exclude thieves and wrongdoers . . . confers on him a special property in goods found on his land sufficient to support an indictment if the goods are taken therefrom, not under a claim of right but with a felonious intent." [25] In effect, therefore, the accused is held to be a thief partly because the landowner intends to exclude thieves. What is particularly interesting about the decision is the recognition that a prosecutor, at least, has sufficient possession or special property in things to sustain a charge of larceny, even though he does not know of their presence or existence. An accused person, on the other hand, gets the worst of both worlds—whilst he can steal from someone who has special property in an object despite his ignorance of its existence, he

[23] *Roman Law and Common Law* (2nd ed., 1952, by F. H. Lawson), p. 357.
[24] s. 1 (2) (1) (*d*).
[25] [1948] 1 All E.R. 860, 862, *per* Lord Goddard.

himself will not be saved by his own ignorance if he takes a thing unknowingly and then, on becoming aware of his mistake, decides to appropriate it, for it is then said that he cannot take possession without knowing of what he takes possession.[26]

However, the decision in *Hibbert* v. *McKiernan* hardly resolves the problem of to whom to attribute possession or special property when a thief abandons the goods he has stolen on public land and they are then discovered by another and again appropriated with felonious intent. Perhaps the answer to this may be found in another strange decision of the Divisional Court which illustrates the limits to which the courts will go in order to punish dishonest persons.

In *McGregor* v. *Benyon* in 1957,[27] a four-year-old child discovered a handbag in a garden near her home. She gave it to her mother who kept it for a few days and then tried to convert some of its contents. In principle, a case like this discloses a loophole in our criminal law: in any properly constructed system, the mother would have been guilty of an offence of receiving; but in English law, since the child was under age and could not steal, her mother did not receive stolen property and, in any event, could probably not have been convicted of attempted receiving even if she had, though her daughter's acts amounted to stealing.[28]

In an earlier case, *Walters* v. *Lunt* in 1951,[29] in which the facts were very similar and the accused were charged with receiving, it was held by the Divisional Court that the parents were not guilty of that offence but it was suggested that they might have been guilty of larceny, either as bailees or finders. Unfortunately, this suggestion is hardly compatible with principle.[30] First, because the two forms of larceny, far from being alternative to one another, are mutually exclusive, the former requiring possession to have

[26] See further below.

[27] Crim.L.R. 608.

[28] See *R.* v. *Percy Dalton* (*London*) *Ltd.* (1949) 65 T.L.R. 326; this decision (and decisions to a like effect), has been both criticised (see Williams, *Criminal Law—The General Part* (1953), pp. 488, 489) and defended (see Smith, "Two Problems in Criminal Attempts," 70 H.L.R. (1956), p. 1443). The courts show no inclination to convict for attempt—see the cases cited by Smith, *ibid.*

[29] 2 All E.R. 645.

[30] See further Williams, 15 M.L.R. (1952), p. 222.

already left the owner, the latter presupposing fictitiously it is true, that it remained with him until wrongfully taken by the thief. Secondly, it can hardly be maintained that there is a bailment, however constructive, between the owner and the parents when the property has already been taken out of the owner's possession by the child and the parents have no intention of holding it for the owner or on his behalf. The only possible bailment is between the child and the parents; to hold otherwise would mean that the general statutory requirement in larceny of an intent simultaneous with a taking would lose most of its significance, the exception to that requirement in the case of bailees being wide enough to cover most of the problematical situations relating to mistake and finding. Thirdly, it is equally ludicrous to argue that the property is found in the owner's possession when it has already been taken out of it by another person, whether or not that person is guilty of a criminal offence in so doing. This is the reason why every receiver of stolen property is not, *ipso facto*, guilty of larceny.

Nevertheless, Lord Goddard held in *McGregor* v. *Benyon* that his apparent suggestion in *Walters* v. *Lunt* regarding larceny by finding was binding. He stated that the mother in *McGregor* v. *Benyon* was guilty of larceny by finding because she had adopted her daughter's acts, even though in fact she had kept the handbag for a few days before openly seeking to convert its contents, which must, therefore, have made it somewhat questionable whether she had the intent to steal at the time of taking possession, even if it could be said that she took the property out of the owner's possession. This decision may have the effect of establishing a new category of larceny with vast potentialities, capable even of rendering the crime of receiving superfluous, and to such judicial creations as larceny by finding and, what has recently been termed, "larceny by finding out," one may in the future be able to refer to "larceny by adoption."

(c) *Possession and Mistake*

However strange the reasoning in *McGregor* v. *Benyon* may appear to the uninitiated, it should come as no shock to anyone

familiar with the larceny cases dealing with mistake which probably represent the high-water mark of judicial inventiveness. For example, it was established in *R.* v. *Riley* in 1853[31] that a person may be guilty of larceny if, having unlawfully taken property by mistake, he formed the *animus furandi* on becoming aware of the true position. Despite the well-established rule that the intent must be contemporaneous with the taking, Chief Baron Pollock considered that this conclusion was so self-evident as to require no support from previous authority, whereas Baron Parke based his agreement on a theory of continuing trespass, to the effect that the initial unlawful act, the trespass, continued so as to coincide with the guilty intent. One of the many flaws in this argument, which was probably inapplicable to the facts of the case, is that larceny is actually defined in terms of a taking and not of a trespass, however closely the two terms are related.[32]

In any event, even though the Larceny Act, 1916, makes no express or implied reference to this decision, except to refute it by stating explicitly "with intent at the time of such taking," its effect was affirmed in *Ruse* v. *Read* in 1949[33] on two quite inconsistent grounds, the first of which confirmed the theory of continuing trespass in this context. In *R.* v. *Kindon* in 1957,[34] the decision was taken a stage further. The accused was one of three girls who unlawfully removed a large sum of money from a drawer in a private flat where they were being entertained one evening. She argued at her trial that when the money was taken she was too drunk to form an intent to steal, although she admitted to having formed the intent when the money was subsequently divided up on a train journey to Doncaster. She was found guilty, not of simple larceny, but of larceny in a dwelling-house. In other words, the offence was committed in the flat and not in the train, whereas the theory of continuing trespass, as enunciated in *Ruse* v. *Read* and in *R.* v. *Riley* from which the case was said to be indistinguishable, postulates that the accused "being a trespasser, the moment that he

[31] Dears. 149.
[32] For a fuller consideration of this case, see particularly Turner, "Two Cases of Larceny," *The Modern Approach to Criminal Law* (1948), pp. 374–389.
[33] 1 All E.R. 398.
[34] Crim.L.R. 607.

took . . . with a felonious intent, he became a thief." Instead, therefore, as in the earlier cases, of the trespass or taking continuing so as later to coincide with the intent, in *R.* v. *Kindon* it had the effect of making the intent retroactive, with the result that the girl became liable to imprisonment for fourteen years in respect of larceny in a dwelling-house instead of five years in respect of simple larceny.

The second ground on which *R.* v. *Riley* was supported in *Ruse* v. *Read* was that the accused did not take possession of the property until he became aware of its existence. This fiction, that one can assume complete physical control without taking legal possession, which was aptly summarised in a later case by the statement that "the taking must be an act of the mind as well as of the hand," [35] is probably the most notorious in the whole of the law of larceny. Whilst it would serve little purpose to recite the many established civil and criminal authorities with which it is inconsistent,[36] it may be instructive to review its application in two of the most recent cases in which it has been considered by an appellate court.

In *Russell* v. *Smith* in 1957,[37] a lorry driver employed by a firm of haulage contractors was instructed to collect a ton of feeding stuffs from X and to deliver it to Y. Because of a mistake by X's servant, eight sacks too many were loaded onto the lorry, and when the driver discovered the mistake on unloading the lorry he resolved to appropriate the excess, which he did. He was charged with larceny of eight sacks but the magistrates dismissed the information on the ground that when he took possession of them he did not intend to steal them. The prosecutor appealed and the Divisional Court held that the driver was guilty since he did not take possession of the eight sacks until he knew of their existence, when he formed the intent to steal them.

The first point to be made about this conclusion that the driver had legal possession of some of the sacks on the lorry but not of

[35] *Moynes* v. *Coopper* [1956] 1 Q.B. 439, 450, *per* Stable J.
[36] See further Kerr, "The Time of Criminal Intent in Larceny," 66 L.Q.R. (1950), p. 174; Cross, "Larceny *de lege lata*," *ibid.*, p. 497; Edwards, "Possession and Larceny," Vol. III of this *Annual* (1950), p. 127.
[37] 2 All E.R. 796.

the others is that it was quite unnecessary for the purposes of securing a conviction. Even if, as the magistrates held, the driver had legal possession of all the sacks when they were loaded onto the lorry, his only interest in them was that of a bailee, and in converting eight of them to his own use without claim of right he was guilty of larceny by a bailee, a form of stealing which dispenses with the requirement of a taking simultaneous with a guilty intent. Moreover, the position of the driver in *Russell* v. *Smith* was, in this respect, on all fours with that of the dustmen in *Williams* v. *Phillips*,[38] and the Divisional Court could always have fallen back on the rather less disreputable fiction that when all the sacks were loaded onto the lorry they fell into the constructive possession of the haulage contractors from whom the driver, the custodian of the sacks, stole eight of them.

From a common-sense point of view, these two possible alternatives to the actual reasoning employed in *Russell* v. *Smith* are difficult to reconcile with each other but, as Dr. Glanville Williams has stated: "The doctrine of possession in larceny is now in such a state that it is legally possible to say that a servant is in possession for one purpose but not for another—in possession *vis-à-vis* the third party but only in custody as between himself and his employers."[39] In any event, neither alternative, apparently, was considered in *Russell* v. *Smith* and the decision was based on the view that one can have the same degree of physical control over two identical objects, have the same awareness of each of them, and yet have legal possession of only one. It is fortunate that the accused could have had no claim of right in respect of any of the sacks for, as has been pointed out by another writer, the sacks which were loaded in error were presumably the last to be loaded onto the lorry, whereas those which were actually appropriated were presumably at the bottom of the pile and had been loaded on first.[40]

One has only to vary slightly the facts of *Russell* v. *Smith* to expose other problems. If, for example, the driver had known of

[38] See note 20, above.
[39] "Mistake as to Quantity in the Law of Larceny" [1958] Crim.L.R. 221–232, 307–313, at p. 312.
[40] J. C. Smith [1957] Crim.L.R. 610.

the correct number of sacks but had mistakenly believed until unloading that their total weight was one ton, it would probably have been held that he initially had sufficient knowledge to acquire legal possession of all the sacks though, perhaps, in such a case the court would then have considered one of the two alternative methods of securing a conviction. Similarly, if he had not been a servant merely employed to carry the sacks but had himself purchased a ton of feeding stuffs from X to sell to Y, he would probably have been convicted even though, strictly, it might have been "necessary to show that the eight sacks [he] took were the very sacks that were added to the consignment by mistake." [41] It seems fantastic that such distinctions, which in no way affect the dishonesty of the accused, should be so important in the law of larceny, a sentiment which, no doubt, was reflected in Lord Goddard's statement that "it would be a good thing . . . if the law of larceny could be somewhat simplified and cleared up." [42]

Fewer cases support this contention better than *Moynes* v. *Coopper* in 1956.[43] As so often happens in this branch of the criminal law, the facts of the case were quite simple and, being plainly indicative of dishonest behaviour, undoubtedly warranted a conviction. The accused received an advance of wages from his employers. On his next pay-day, he collected from the wages clerk, who was unaware of the advance, a packet containing more money than he was actually entitled to, but he did not discover the mistake until later in the day when he decided to keep the over-payment. He was subsequently charged with larceny of this amount and was convicted by the magistrates, but the conviction was quashed by the Quarter Sessions' Appeals Committee, whose finding was upheld by the majority of the Divisional Court, Stable J. dissenting.

It is clear that two quite distinct problems are immediately raised by these facts, neither of which, it must be stressed, would be occasioned by an adequate system of criminal law. First, did the accused take possession of the over-payment without the consent of the owner or was he given ownership of it? For, if he

[41] Williams, *loc. cit.*, in note 39, above, at p. 311.
[42] [1957] 2 All E.R. 796, 797.
[43] *Loc. cit.*, in note 35, above.

were given ownership without having made any false pretence, then he could be guilty of no criminal offence in English law, not even fraudulent conversion or obtaining by false pretences. Secondly, even if he did take possession without the consent of the owner, did he have an intent to steal at the time of taking possession? Having regard to the reasoning which had previously been employed by the Court of Criminal Appeal in *R.* v. *Hudson* in 1943 [44] and was later to be adopted by the Divisional Court in *Russell* v. *Smith*, it might have been thought that the second problem should have caused no difficulty in *Moynes* v. *Coopper*, but this did not prove to be the case, at least in the Divisional Court. In any event, it is very doubtful whether the second problem need ever have been considered by the Divisional Court; for it was probable that the accused was given ownership and never *took* possession of the over-payment, a conclusion which was reached by the Appeals Committee.

The principal, and extremely troublesome, authority on the first problem relating to ownership or possession is the decision of the Court of Crown Cases Reserved in *R.* v. *Middleton* in 1873,[45] holding that where a post office clerk referred to the wrong advice note and mistakenly handed over to a drawer a greater sum than he was entitled to, the latter was guilty of larceny if he took the money knowing of the clerk's mistake. There is hardly the space in this paper to re-examine the many remarkable features of this decision [46] and it must suffice to note that it is generally agreed that the mistake of the clerk as to an essential element in the transaction, whether the identity of the drawer or of the sum handed over, prevented ownership in the money passing. Moreover, the conclusion that the accused took possession without consent for the purposes of larceny is now confirmed by section 1 of the Larceny Act, 1916. Unfortunately, as is often the case with decisions of the Court of Crown Cases Reserved, it is impossible to be sure of exactly what *R.* v. *Middleton* established. Certainly, three of the eleven majority judges rested their agreement on the grounds that

[44] [1943] 1 K.B. 458.
[45] 2 C.C.R. 38.
[46] See further Turner, *loc. cit.*, in note 32, above, pp. 356–374.

the clerk lacked authority to part with ownership or possession of the excess, and this view was taken by Stable J. of the wages clerk in *Moynes* v. *Coopper,* although the Appeals Committee had found, as a question of fact, that there was no lack of authority. Once Stable J. had taken this view, he was justified in considering the second problem as to the time of taking possession and in concluding, in agreement with the Court of Criminal Appeal in *R.* v. *Hudson*, that the accused never took possession until he knew what he was taking, or at least whether what he was taking belonged to him or not.

The Appeals Committee, on the other hand, had quashed the conviction on the grounds that ownership and possession of the excess had passed to the accused with the consent of the owner, there having been no dispute as to the authority of the wages clerk and no question of mistake of the identity either of the accused or of the money handed to him. The only mistake related to a motivating fact, because the clerk in *Moynes* v. *Coopper* merely did not realise that the accused had already received an advance of wages, and this did not prevent ownership passing. While this conclusion was probably correct, it must appear strange that the question of liability should hinge on such a distinction, for the mistake in both cases, whether classified as one of identity or of motive, was essentially the same, namely, that the accused was entitled to receive the amount of money actually handed to him. The Committee, therefore, did not have to consider the second problem and, indeed, it was only, apparently, after the conviction was reversed and the prosecutor asked for a case to be stated that it was found as a question of fact that the accused formed the intent to steal when he reached home and not when he was given the packet.[47]

The most remarkable feature of the short majority judgment of the Divisional Court, upholding the reversal of the original conviction, is its failure to keep the two problems separate and its confusion of the significance of such decisions as *R.* v. *Middleton* and *R.* v. *Hudson*. Whilst the judgment deserves careful

[47] See further Smith, "Larceny by Finding Out" [1956] Crim.L.R. 516, 518.

consideration, it may be enough to cite a brief extract from it to illustrate the tangled reasoning which characterises so many of the recent cases on larceny. After quoting the words in section 1 of the Larceny Act, 1916, which are designed to embody the conclusion in *R.* v. *Middleton*, that a person may take possession for the purposes of larceny where he had been given property because of a mistake on the part of the owner of which he is aware, Lord Goddard continued: "This, in our opinion, is affirming the common law that the taker must have *animus furandi* at the time when he takes the property. In *Middleton's* case the wrong amount of money was paid by the post office clerk to the prisoner, who picked it up knowing of the clerk's mistake and so took it *animo furandi*. In the present case, it is found that the defendant did not know of the mistake when he took the money, so the taking was not *animo furandi*. We prefer to base our decision on this ground, namely, that there was no taking here within the section." [48] It should, however, be evident from what has already been stated that the point in issue in *R.* v. *Middleton* had nothing to do with the problem surrounding the time of taking but concerned the preliminary problem whether the accused was given ownership or possession with consent. Lord Goddard's statement that the taking in *Moynes* v. *Coopper* was not *animo furandi* is impossible to reconcile with the decision in *R.* v. *Hudson* and with the reasoning later adopted in *Russell* v. *Smith*, though the former Lord Chief Justice attempted to reconcile it with the former decision on the grounds that in *R.* v. *Hudson* the property in question was never intended for the accused, *i.e.*, that the accused was never given ownership or possession with the consent of the owner.

Conclusion

The few recent decisions which have been considered in this paper are concerned only with a small, albeit important, part of the whole field covered by the property offences. Attention has been drawn to these decisions because they illustrate most vividly the deplorable state of this branch of the criminal law. The problems with which

[48] [1956] 1 Q.B. 439, 445.

they deal raise no basic issues of criminal policy but stem entirely from judicial efforts to stop gaps in the law of larceny which should long ago have been stopped by Parliament. Whereas most people would agree that the convictions obtained in such cases as *Hibbert* v. *McKiernan*, *Williams* v. *Phillips*, *McGregor* v. *Benyon*, *R.* v. *Kindon* and *Russell* v. *Smith* were fully justified by the facts, there can be little sympathy for the process by which they were obtained. The form of future legislative action requires most careful consideration but it is at least clear that a more comprehensive and less technical definition of larceny, based, for example, more closely on the form of the Roman concept of *furtum*, would simply avoid most of the problems involved without giving rise to fresh ones. Unfortunately, if one directs one's attention to the other property offences, the same types of problem are evident and the following comment from the Divisional Court in a recent decision on receiving provides an apt conclusion to this paper: "We should have been glad to have been able to come to a different conclusion, for this case illustrates the difficulty with which the prosecution is faced upon a charge of receiving where the goods have in fact been obtained by a misdemeanour such as false pretences. It seems the height of absurdity that the receiver should have committed no offence if he erroneously thought that the goods had been obtained by the graver crime of stealing; but although it is the first time that the matter has come before the court, this appears to have been the law since the offence was first created in 1861, and if the matter is to be remedied, as we for our part think it should, only Parliament can do so." [49]

[49] *D. P. P.* v. *Nieser* [1958] 3 W.L.R. 757, 768.

CRIMES ON BOARD AIRCRAFT

Bin Cheng

Man is now already upon the threshold of the proverbially unattainable moon. But everywhere the law has yet to catch up fully with conventional aviation. This lag is nowhere more noticeable than in the field of criminal law and criminal jurisdiction as applied to civil aircraft.[1]

A case which caused much stir a few years ago on the other side of the Atlantic is *U.S.A.* v. *Cordova and Santano*.[2] The defendants were passengers on board an American commercial airliner flying from Puerto Rico to New York on August 2, 1948. While the aircraft was over the high seas, a fight developed between the two defendants over a missing bottle of rum. The defendant Cordova literally went berserk, struck and bit both the captain of the aircraft and the stewardess who intervened. He was eventually locked up.

When the aircraft arrived in New York, the defendants were arrested. The United States District Court, Eastern District of New York, before which the defendants were charged with assault, held, however, that as a federal court it had no jurisdiction to punish the alleged offences. Title 18 U.S.C.A. § 451 had been

[1] Offences on board aircraft are being increasingly reported. In addition to cases cited hereafter, especially those concerning aeronautical offences, a few others may be mentioned: Stowaways: *U.S.* v. *Peoples* (1943) 1 Avi. 1091; attempted theft of aircraft at Darwin to fly it to the South Molucca Government (*The Times*, September 7, 1954); seizure of aircraft in mid-air: a Hungarian Malev Airline aircraft (*The Times*, July 14, 1956); South Korean airliners, February 16 and April 10, 1958 (*The Times*, April 11, 1958); Cuban airliners, October, November 1 and 5, 1958, April 16 and 26, 1959 (*The Times*, November 6, 1958; April 17 and 27, 1959); a Haitian army transport aircraft, April 9, 1959 (*The Times*, April 11, 1959); sabotage: *People* v. *Grant* (1951) U.S.Av.R. 401; the Indian airliner carrying Chinese Communist delegates to the Bandung Conference, April, 1955; the case of John Gilbert Graham at Denver, Colorado, November, 1955; and a Skyways airliner at Nicosia (*The Times*, March 7, 1956).

[2] (1950) U.S.Av.R. 1; 3 Avi. 17,306. See also J. C. Cooper, "Crimes Aboard American Aircraft," *American Bar Association Journal* (1951); P. Gerhardt, "Jurisdiction of Crimes in Aircraft over the High Seas," 18 *Journal of Air Law and Commerce* (hereinafter J.A.L.C.) (1951); W. E. Hilbert, "Jurisdiction in High Seas Criminal Cases," 18–19 J.A.L.C. (1951–52); A. W. Knauth, "Crimes in the High Air," 25 *Tulane L.R.* (1950–51).

submitted by the prosecution as providing the basis of the court's jurisdiction. This provision defines the admiralty and maritime jurisdiction of the federal courts, and submits to federal jurisdiction, *inter alia*, crimes committed "on board American vessels on high seas or Great Lakes." In the court's judgment, an aircraft is not a vessel within the meaning of that word in the said statute. Consequently, although in the court's view "the situation may call for correction," "as the law now stands, acts like those committed by Cordova will go unpunished." [3] On July 12, 1952, the United States Congress passed Public Law 514 which confers jurisdiction on federal courts over certain common law crimes of violence when such crimes are committed on board an American aircraft in flight over the high seas.

Just as the *Cordova* case drew attention to a previous gap in the criminal jurisdiction of United States federal courts, a corresponding *lacuna* in English criminal law has recently been made obvious by Devlin J.'s decision in *R.* v. *Martin and Others*.[4] The facts at issue in this case are also quite simple. The defendants, while serving as part of the personnel on board British aircraft, allegedly carried raw opium from Bahrein to Singapore between January 1, 1954, and August 18, 1955. They were brought before the Central Criminal Court and charged, *inter alia*, with being in unlawful possession of drugs contrary to the Dangerous Drugs Regulations, 1953, reg. 3.

Cordova's case and *Martin's* case together illustrate two separate problems involved in the topic of crimes on board aircraft. In the former case the defendants were set free because the court lacked jurisdiction.

In *Martin's* case the court would have had jurisdiction had there been a rule of substantive law making the act complained of a criminal offence. But since the law invoked by the prosecution was held not applicable to events on board a British aircraft outside Britain, there was in law no offence and the defendants were set free. Indeed, from the outset, the prosecution conceded that the relevant regulation of the Dangerous Drugs Regulations, 1953, was

[3] *Per* Kennedy J., at pp. 9–10 and 17,311, respectively.
[4] [1956] 2 Q.B. 272. *Cf.* R. Y. Jennings in 5 I.C.L.Q. (1956).

applicable only to Great Britain. But they relied on section 62 (1) of the Civil Aviation Act, 1949, which reads as follows:

> "(1) Any offence whatever committed on a British aircraft shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

The prosecution maintained that, since the defendants were now in England, the act was to be deemed to have been committed in England. If this contention were correct, section 62 (1) of the Civil Aviation Act would, in effect, make British aircraft, while they are flying abroad, airborne portions of England to which English criminal law as a whole would be applicable, provided that the wrongdoer subsequently comes to England.

Devlin J., however, declined to accept this interpretation. He held that section 62 was not of a substantive character which affected the legality of acts on board British aircraft while outside Great Britain. It was purely procedural and would only act to confer local jurisdiction if, prima facie, an offence had been committed on board a British aircraft while it was flying outside Britain. But, first, there must be a substantive rule of English criminal law making the act an offence. Section 62 (1) did not have the effect of extending the whole corpus of English criminal law to British aircraft abroad. "Accordingly," Devlin J. held, "it follows that the dispositions do not show or disclose that any criminal offence has been committed, and therefore the committal is bad, and on that ground I quash the indictment." [5]

The above reason constitutes the essence of the decision. But in the court's opinion, "it would be most undesirable if it were thought it necessarily followed from this decision that anything could be done on board a British aircraft with impunity." [6] Thereupon, the judgment proceeds in an attempt to dissipate this impression and to suggest a distinction between universal offences and *mala prohibita*. But it follows from what has already been said that this part of the judgment is merely *obiter*.

[5] At p. 288.
[6] At p. 285.

A British aircraft abroad is, however, far less of a flying oasis of lawlessness than it might sometimes be thought. A substantial body of English aeronautical regulations follow United Kingdom aircraft wherever they may be in order to ensure the safety of the aircraft and of persons and property on board and on the ground. Acts prohibited by these regulations may be collectively called aeronautical offences. These aeronautical regulations are to be found principally in the Civil Aviation Act, 1949, and Orders in Council and regulations made thereunder. An up-to-date list of such Orders and regulations may conveniently be found in the *United Kingdom Air Pilot*. On the other hand, the *Martin* case has doubtless drawn attention to the failure of the general body of English criminal law to catch up with this method of locomotion.

There has already been a great deal of discussion devoted to the problem of crimes on board aircraft[7] and it is one of the subjects under study by the International Civil Aviation Organisation.[8] The problem is one which is common to all nations, and many countries—including, as mentioned above, the United States—have already adopted special legislation in this regard.[9] The

[7] See note 2, above, and J. C. Cooper, *The Legal Status of Aircraft* (1949); J. P. Honig, *The Legal Status of Aircraft* (1956); M. S. Kamminga, *The Aircraft Commander in Commercial Air Transportation* (1953); A. W. Knauth, "Status of Aircraft with Reference to Criminal Law for Aircraft," Report to the New York Conference (1958) of the International Law Association; A. D. McNair, *The Law of the Air* (1953), pp. 117 *et seq.*; A. Meyer, "Le statut juridique de l'aéronef," Report to the New York Conference (1958) of the I.L.A.; C. N. Shawcross and K. M. Beaumont, *Air Law* (1950—Supplement, 1955), §§ 90 *et seq.*, 248 *et seq.*

[8] It is one of the topics of the Legal sub-committee on the Legal Status of Aircraft which first met in September, 1956. The sub-committee produced a draft convention in 1958 (ICAO Doc. LC/SC "Legal Status" WD No. 63, 20.IX. 1958; 8 *Zeitschrift für Luftrecht* (1959), p. 63). The subject was first discussed by the Institut de Droit International when Fanchille submitted to it a draft code of air law in 1910 (*Annuaire*, 1910), subsequently by the Comité Juridique International de l'Aviation, the Comité International Technique d'Experts Juridiques Aériens, the Harvard Law School in its Researches on "Jurisdiction with respect to Crime" (1935) and is currently also under active study by the Air Law Committee of the International Law Association. It was also considered by the International Congress of Criminal Law at its seventh Congress at Athens in 1957; see *Revue internationale de droit pénal* (1957), pp. 589 *et seq.* See also the comments of the Institute of Air Law (Cologne) on the 1958 ICAO draft, 8 Z.f.L. (1959), pp. 151 *et seq.*

[9] See above, p. 178.

An analysis of various national laws reproduced in UN, *Laws and Regulations on the Régime of the High Seas*, Vol. II (1952—Supplement, 1959), yields the following patterns of national laws in regard to crimes on board aircraft:

intention here is neither to study the problem of crimes on board aircraft in the abstract nor to suggest ideal over-all solutions, but to examine the position as it actually exists in relation to the United Kingdom.

Position under International Law

First, it is necessary to consider the international competence of States to adopt and to enforce rules of criminal law. In this connection, it may be helpful to coin two new terms: *jurisfaction* and *jurisaction*. The former denotes the legislative power of a State, as well as the competence of its courts to apply such rules. The latter describes the actual administration of justice and the enforcement

I. Territorial sovereignty over all aircraft in the country. And quasi-territorial sovereignty over all national aircraft abroad:

(1) Generally: Cuba (Code of Social Defence, 1936); India (Penal Code, 1860, as amended); Israel (Area of Jurisdiction and Power Ordinance, 1956 Amendment); Japan (Penal Code, 1907, as amended); Pakistan (Penal Code, 1860, as amended); Philippines (Penal Code, 1930); Poland (Penal Code, 1932); Sweden (Penal Code, 1864, as amended); Uruguay (Aviation Code, 1942).

(2) Only when in flight: Honduras (Aviation Law, 1950); Hungary (Penal Law, 1950).

(3) Only when not subject to territorial criminal law of a foreign State: Ecuador (Penal Code, 1939); Greece (Penal Code, 1950); Norway (General Penal Code, 1902, as amended).

(4) Only when over the high seas or in *territorium nullius*: Brazil (Air Code, 1938); Costa Rica (Penal Code, 1941); Guatemala (Penal Code, 1936); Italy (Penal Code, 1930; Navigation Code, 1942).

(5) If they are commercial aircraft: Switzerland (Federal Air Navigation Act, 1948).

II. Quasi-territorial principle applied to both national aircraft abroad and foreign aircraft in the country subject to following exceptions when national law applies territorially even to foreign aircraft in the country:

(1) Where there are specific provisions to the contrary: Venezuela (Civil Aviation Code, 1944).

(2) If a national is involved or if the aircraft lands in national territory after the commission of the offence: Belgium (Air Navigation Act, 1937); France (Air Navigation Act, 1924).

(3) If the offence produces effect outside the aircraft, if a national is involved, or if the aircraft lands in national territory after the commission of the offence: Lebanon (Penal Code, 1943); Luxembourg (Air Navigation Act, 1948); Syria (Penal Code, 1949).

III. Following an analogy from maritime law, several States refrain from exercising jurisdiction over foreign aircraft in national territory if it is merely a matter of internal discipline on board the aircraft. Exceptions are usually made in cases where the offence produces effect beyond the aircraft, local peace is disturbed, or the assistance of the local authorities is requested:

(1) Over national territory generally: Guatemala (Penal Code, 1936); Roumania (Penal Code, 1936).

(2) Over the territorial sea: Cuba (Code of Social Defence, 1936); Lebanon (Penal Code, 1943); Syria (Penal Code, 1949).

of such laws, such as powers of arrest, passing sentence, imprisonment and so forth.

A. Exclusive Jurisaction

As Judge Max Huber so rightly said in the *Palmas* case (1928) between the Netherlands and the United States, territorial sovereignty is the "point of departure in settling most questions that concern international relations." [10] "Sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the *right to exercise therein, to the exclusion of any other State, the functions of a State.*" [11] Within its national territory, and territories subject to its territorial jurisdiction, such as mandated or trust territories, occupied or protected territories, territorial jurisdiction implies the State's *exclusive* right of juris*action*.

In addition, a sovereign State has also the power of exclusive juris*action* in respect of ships and aircraft possessing its nationality on and over the high seas, subject only to the right of other States to punish piracy and to act in self-defence.[12] This power is *quasi-territorial* in character in that it extends not only to the ships and aircraft concerned, but also to all persons and objects on board.

The position in regard to *territorium nullius* is not entirely clear. There is no doubt that every State retains the power of exclusive juris*action* over its nationals based on its *personal sovereignty* over them, and over all ships and aircraft possessing its nationality, as well as all persons on board, based on its *quasi-territorial sovereignty* over such ships and aircraft. Presumably, the flag State of such craft may continue to exercise quasi-territorial juris*action* over all persons on board, even of foreign nationalities, when they disembark temporarily in *territorium nullius*, but this cannot be considered as altogether certain. Perhaps this extension of quasi-territorial juris*action* exists only to the extent to which the national

[10] 2 *United Nations Reports of International Arbitral Awards* (hereinafter UNRIAA), p. 829, at p. 838.

[11] *Ibid.* (italics added).

[12] *Cf.* the writer's *General Principles of Law as Applied by International Courts and Tribunals* (1953), pp. 77 *et seq.*

States of these foreigners are not exercising personal juris*action* over them.

In time of peace, apart from piracy and the right of self-defence of other States on the high seas, and subject to treaty arrangements to the contrary,[13] the power of juris*action* in respect of a ship, an aircraft or an individual, at any given place, belongs always exclusively to one State,[14] although in moving from one place to another, such a ship, aircraft or individual may successively come under the juris*actions* of several States. In other words, in time of peace, and subject to the exceptions mentioned, a ship, aircraft or individual can be arrested, tried and punished only by one State at any given time and place. Thus, while an aircraft in the United Kingdom is subject exclusively to United Kingdom juris*action*, it will come under exclusive French juris*action* when it enters into French territory. The power of juris*action* is, therefore, always exclusive.

Under present-day international law, in case of conflict between the various forms of sovereignty, the following hierarchical order prevails: Territorial sovereignty, quasi-territorial sovereignty and personal sovereignty. In other words, if they clash, territorial sovereignty overrides the others, while quasi-territorial sovereignty overrides personal sovereignty.[15] This explains also why the exercise of personal sovereignty is frequently reduced to mere juris*faction*.

B. Universal and Concurrent Jurisfaction

For, while at any given time and place, the power of juris*action*, subject to the exceptions mentioned, belongs always exclusively to one State, the power of juris*faction* may be, and usually is, shared by many States. In other words, they exercise concurrent juris*faction*. Since the decision of the Permanent Court of International Justice in *The Lotus* (1927), it has become clear that under international customary law every State has extensive powers of

[13] *Cf.* G. Schwarzenberger, *International Law*, Vol. I (1) (1957), pp. 338 *et seq.*

[14] Apart from such exceptional cases as *condominium*, leased territories, capitulations. But even in such cases, delimitation of the respective juris*actions* of the States concerned still has to be made. *Cf.*, *e.g.*, Permanent Court of Arbitration: *Casablanca Deserters Case* (1909), Scott, 1 *Hague Court Reports*, p. 110.

[15] *Cf. Casablanca Deserters Case* (1909), *loc. cit.*, in note 14, above.

extra-territorial juris*faction*, both civil and criminal. The Court said:

> "Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. *The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.*" [16]

(1) *Extra-territorial juris*faction *based on personal sovereignty, and quasi-territorial sovereignty*

In regard to extra-territorial juris*faction*, as Judge J. B. Moore said in his separate opinion:

> "No one disputes the right of a State to subject its citizens abroad to the operations of its own penal laws, if it sees fit to do so." [17]

This extra-territorial juris*faction* is based on every State's *personal sovereignty* over its nationals. It seems also undisputed that every State has the power of extra-territorial juris*faction* in respect of ships and aircraft possessing its nationality, not only while they are on or over the high seas or in *territorium nullius*, but also when they are in or over foreign countries. In so far as this juris*faction* is exercised in regard to ships and aircraft possessing the nationality of the State concerned, it is in fact a manifestation of the personal sovereignty or, if one prefers, the quasi-personal sovereignty which the State enjoys over specific categories of its nationals. But to the extent to which this juris*faction* extends to foreigners on board such ships and aircraft, it is also *quasi-territorial* in character.[18]

A State's extra-territorial juris*faction* over its nationals, including ships and aircraft, will normally be concurrent with the powers of juris*faction* of other States, for instance, when such ships or aircraft

[16] A 10, p. 20 (italics added).
[17] A 10, p. 92.
[18] See above, p. 182.

are on or over the high seas and carry passengers of foreign nationalities. It may also be concurrent with another State's power of juris*action*, for instance, when the nationals of a State, including ships and aircraft possessing its nationality, enter a foreign country. This concurrence in jurisdiction does not ordinarily give rise to serious practical difficulties, because, as has been explained before, at any given time and place, the power of juris*action* normally belongs exclusively to only one State.[19]

(2) *Extra-territorial jurisfaction based on the "protective" principle*

The question in issue at the time of *The Lotus* (1927), which remains even today somewhat controversial, was the extent to which a State was entitled to exercise extra-territorial juris*faction* in regard to persons, ships and aircraft that were not its nationals or to persons on board a ship or aircraft not of its nationality, in other words, persons and objects that were not subject to its personal or quasi-territorial sovereignty.

The World Court, in a crucial passage, held:

> "Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules."[20]

The Court did not specify, however, what these prohibitive rules were. But the arguments of the parties before the Court and the individual opinions of some of the judges in *The Lotus* (1927) would seem to indicate that the actual point in issue was the legality of the so-called "protective" principle.

According to this principle, every State may make its laws applicable to foreign nationals even while they are not subject to its territorial, quasi-territorial or personal sovereignty, for the purpose of protecting its own interests, including its nationals, ships

[19] See above, pp. 182–183.
[20] A 10, p. 19.

and aircraft abroad. As Judge J. B. Moore said in his individual opinion:

> "In substance, it means that the citizen of one country, when he visits another country, takes with him for his 'protection' the law of his own country and subjects those with whom he comes into contact to the operation of that law." [21]

Judge Moore also pointed out the consequences of the "protective" principle:

> "In this way an inhabitant of a great commercial city, in which foreigners congregate, may in the course of an hour unconsciously fall under the operation of a number of foreign criminal codes." [22]

It is at least arguable that the World Court, in sustaining the power of extra-territorial juris*faction* of States, did not intend to go beyond the "protective" principle. In other words, while every State has unlimited universal juris*faction* in regard to its own nationals, including ships and aircraft possessing its nationality, its power of universal juris*faction* in respect of persons, objects and acts not subject to its personal or quasi-territorial sovereignty exists only to the extent to which its own interests require to be protected.

Aircraft In or Over the United Kingdom

Today, there is no dispute that every State enjoys complete and exclusive sovereignty over not only its surface territory, but also the airspace above it.[23] Thus, at least from the standpoint of international law, all aircraft, whether United Kingdom or foreign registered, are, while in or over United Kingdom territory, subject to United Kingdom criminal and civil laws, as well as the concurrent universal juris*faction* of other States that may be concerned. But, as long as they are within the country, they are subject only to United Kingdom juris*action*. While this is so under international

[21] A 10, p. 92.
[22] *Ibid.*
[23] *Cf.* the writer's "The Right to Fly," 42 *Grotius Society Transactions* (1956), p. 99, at pp. 100 *et seq.*

law, the position of crimes on board aircraft within the United Kingdom appears to be as follows under English law.

A. All Aircraft in or over England, excluding the Territorial Sea

English criminal law is applicable to, and English courts have jurisdiction over, all acts committed by all aircraft in or over England, excluding the territorial sea, or by persons on board such aircraft. This exclusive territorial juris*action* includes all United Kingdom aeronautical laws and regulations.[24] The position of aircraft on or over the United Kingdom territorial sea has to be separately examined.

B. Aircraft on or over the United Kingdom Territorial Sea

(1) *General criminal law*

Here doubt already begins. It would appear that, even in respect of aircraft within the United Kingdom, this country has not made full use of its international juris*faction* and juris*action*. This situation springs from the rather rigid territorial character of the common law. In the well-known case of *R.* v. *Keyn*, decided by the Court for Crown Cases Reserved, Cockburn C.J. held that according to the ancient law of England "on the shore of the outer sea the body of the county extends so far as the land is uncovered by water. And so rigorous has been the line of demarcation between the two jurisdictions, that, as regards the shore between high- and low-water mark, the jurisdiction has been divided between the Admiralty and the common law according to the state of the tide." [25]

Cockburn C.J. conceded that during the previous two hundred years international law might have developed a rule which allowed every State to claim a maritime belt as its own territory. But he maintained:

> "It is unnecessary . . . to the decision of the case, to determine whether Parliament has the right to treat the three-

[24] See below, pp. 190 *et seq*. This is, of course, subject to the reservation that there may be provisions that are expressly stated to be applicable only to United Kingdom registered aircraft.

[25] (1876) 2 Ex.D. 63, 168.

> mile zone as part of the realm consistently with international law. That is a matter on which it is for Parliament itself to decide. It is enough for us that it has, so far as to be binding on us, the power to do so. The question is whether, acting judicially, we can treat the power of Parliament to legislate as making up for the absence of actual legislation. I am clearly of opinion that we cannot, and that it is only in the instances in which foreigners on the seas have been made specifically liable to our law by statutory enactment that that law can be applied to them. . . ." [26]

Consequently, it was decided that common law did not apply to, and common law courts had no jurisdiction over, an incident which occurred off the shores of England but within three miles thereof. This incident also escaped Admiralty jurisdiction in that it took place on board a foreign vessel to which Admiralty jurisdiction, limited essentially to British ships on the open sea, did not extend save in case of piracy.[27]

Parliament acted promptly and passed the Territorial Waters Jurisdiction Act, 1878. Three points, however, merit attention.

First, while the Act claims the territorial sea as having always formed a part of the realm,[28] it does not affirm that common law applies and has always applied to this maritime belt. What the Act has done, on the contrary, is to extend Admiralty jurisdiction *ratione personae*. The Act has not considered it necessary to extend it *ratione loci*—thus indirectly confirming Cockburn C.J.'s view that common law jurisdiction ceases at, and Admiralty jurisdiction begins from, where the sea touches the land. The Act now extends Admiralty jurisdiction to foreigners even when they are on board a foreign ship as long as the ship, when the act is committed, is within United Kingdom territorial waters. Section 2 of the Act provides:

> "Any offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's dominions, is an offence within

[26] *Ibid.*, p. 208.
[27] See below, pp. 202 *et seq.*
[28] Preamble.

> the jurisdiction of the Admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly."

Secondly, it should be noticed that not the whole *corpus* of English criminal law has thus been made applicable to foreigners and foreign ships in this maritime belt. They are merely liable to what on shore would be indictable offences. Section 7 of the Act states:

> "'Offence' as used in this Act means an act, neglect, or default of such a description as would, if committed within the body of a county in England, be punishable on indictment according to the law of England for the time being in force. . . ."

Finally, the prosecution of offences committed by foreigners on not only foreign ships, but also British ships, in the territorial sea is subject to the consent of one of the Principal Secretaries of State who has to certify that it is expedient to do so.[29]

Now, if aircraft were to be assimilated to ships—and this assimilation is more than doubtful except in specific cases stipulated by statute, *e.g.*, in cases of collision with ships—it might be argued that the Territorial Waters Jurisdiction Act, 1878, made English law applicable to, and gave jurisdiction to English courts over acts committed by foreigners on board foreign aircraft or by means of foreign aircraft while on or over the United Kingdom territorial sea, to the extent that such acts, if committed on shore, would constitute indictable offences. But if this assimilation of aircraft to ships is rejected—and it is submitted that it should be—then *the position of foreign aircraft, as well as United Kingdom registered aircraft, on or over the territorial sea would be the same as if they were on or over the high seas, subject to any statutory provisions to the contrary.*[30] What is clear is that the Territorial

[29] ss. 3 and 4.

[30] There are, of course, statutes which expressly include the territorial sea in their application, *e.g.*, the Foreign Enlistment Act, 1870, provides in its s. 2: "This Act shall extend to all the dominions of Her Majesty, including the adjacent territorial waters."

Waters Jurisdiction Act, 1878, is not applicable to aircraft and the gap in maritime law revealed by *R.* v. *Keyn* exists today in air law.

(2) *Aeronautical offences*

At present, apart from isolated statutes, only aeronautical regulations partially fill this gap. Section 63 (5) of the Civil Aviation Act, 1949, provides that "any reference in this Act to any country or territory shall, unless the context otherwise requires, be construed as including a reference to the territorial waters, if any, adjacent to that country or territory." Likewise, the provisions of the Air Navigation Order, 1954, which contains the major portion of United Kingdom aeronautical regulations, are applicable to all aircraft, whether United Kingdom or foreign registered, in or over the United Kingdom, including the territorial sea.[31]

Section 11 of the Civil Aviation Act forbids dangerous flying. The Air Navigation Order, *inter alia*, prescribes that no aircraft may fly unless registered[32]; contains provisions concerning student pilots[33] and instruction in flying[34]; and prohibits the bearing of any mark or sign appropriated for use by State aircraft,[35] flying in certain specified areas,[36] the carriage of munitions of war, implements of war,[37] or other dangerous goods,[38] the commencement of a flight when there is on board the aircraft any person in a state of intoxication or any member of the personnel of the aircraft under the influence of intoxicating liquor or drug,[39] the carriage of persons on or in certain parts of an aircraft,[40] and the sole control of aircraft by young persons.[41] These regulations in the Air Navigation Order, 1954, as well as section 11 of the Civil Aviation Act, are applicable to all aircraft in or over the United Kingdom, including the territorial sea, whether United Kingdom or foreign registered.

31 See Arts. 68 and 73.
32 Art. 1 (this Article applies only within the United Kingdom).
33 Art. 25 (this Article applies only within the United Kingdom).
34 Art. 26 (this Article applies only within the United Kingdom).
35 Art. 10.
36 Art. 35 (this Article applies only within the United Kingdom).
37 Art. 36.
38 Art. 37.
39 Art. 40 (3).
40 Art. 44, as amended by the Air Navigation (Third Amendment) Order, 1956 (this Article applies only within the United Kingdom).
41 Art. 46.

Moreover, the Rules of the Air, which constitute the Second Schedule to the 1954 Order, are similarly applicable.[42] They contain regulations which forbid dangerous flying,[43] impose right-of-way rules in order to prevent collision,[44] stipulate minimum heights,[45] control the towing and picking up of objects,[46] forbid aerobatic flights likely to endanger air traffic or over specified areas,[47] and generally seek to ensure safety in the air by regulating air traffic. These Rules of the Air are also applicable to United Kingdom registered aircraft extra-territorially, unless they conflict with local law.[48]

As to the persons responsible for any contravention of the provisions of the Air Navigation Order by an aircraft, whether United Kingdom or foreign registered, Article 67 (1) states:

> "If any aircraft contravenes, or is in default under, any provision of this Order or of any regulations made, or directions given thereunder, *the operator* of the aircraft and *the person in command* (unless he is also the operator) thereof shall, without prejudice to the liability of any other person under that provision, be deemed to have contravened this Order, unless he proves that the contravention or default—
>
> (*a*) was due to accident, stress of weather or other unavoidable cause; or
>
> (*b*) took place without his actual fault or privity."

42 Art. 47.

43 Rule 11.

44 Rule 14 (some of the requirements apply only within the United Kingdom).

45 Rule 15, as amended by the Air Navigation (Fourth Amendment) Order, 1956. *E.g.*, on February 11, 1954, the Evening Standard Co., Ltd., as operator, and the person in command were each fined £20 at Woolwich Magistrates' Court when a helicopter, G-ANAL, was flown below the minimum altitude over the Royal Arsenal at Woolwich on September 11, 1953. They were also fined £5 each because the aircraft "was flown in such circumstances as, by reason of the low altitude, to cause unnecessary danger to persons and property on land" (*Ministry of Transport and Civil Aviation* v. *Evening Standard Co. and Green* [1954] Crim.L.R. 298).

46 Rule 16 (some of the requirements apply only within the United Kingdom).

47 Rule 19 (1) and (2).

48 Rule 5. As these Rules are based on the International Standards and Recommended Practices of the International Civil Aviation Organisation (hereinafter ICAO), when United Kingdom aircraft are flying in the territory of another member State, local flight rules are to be observed only if they do not conflict with United Kingdom Flight Rules.

It is curious that, in this regard, there is no definition of the term "operator of the aircraft." But it is obvious that it is not intended to mean the person who operates the actual control of the aircraft. Annexes 6, 9, 11 and 12 of the Chicago Convention of 1944 on International Civil Aviation, on which a great deal of the provisions of the Air Navigation Order is based, define the operator as "a person, organisation or enterprise engaged in or offering to engage in an aircraft operation."[49] As to the term "the person in command," it means, in a case where a person other than the pilot in charge is in command of the aircraft, that person, and in any other case, the pilot in charge.[50]

Attention should be drawn to the fact that, while the person in command is normally with the aircraft, the operator will usually not be. Consequently, the aircraft and its operator may be at different places at any given time. For purposes of the Air Navigation Order, therefore, the operator of an aircraft which is actually in or over the United Kingdom will be constructively deemed to be in the United Kingdom, even though he may physically be elsewhere.

In addition to provisions governing the operation of aircraft, the 1954 Air Navigation Order contains various regulations directed at different categories of persons on board an aircraft: (a) every person on board, (b) members of the crew, (c) the pilot, and (d) the person in command.

(a) *All persons on board.* Thus, for instance, no person may, with intent to deceive, forge, alter, delete or mutilate licences, logs or other documents[51]; carry dangerous goods[52]; commit any act likely to imperil the safety of an aircraft or any person on board, whether by interference with any member of the personnel of the aircraft, or by tampering with the aircraft or its equipment, or by disorderly conduct or by any other means[53]; enter or be in any aircraft while in a state of intoxication[54]; smoke in a compartment

[49] *Cf.* also ICAO, *Lexicon of Terms used in Connection with International Civil Aviation* (1952). *Cf.* also above, note 45.
[50] Air Navigation Order, 1954, Art. 73 (1).
[51] Art. 32. [52] Art. 37.
[53] Art. 39. See *R.* v. *Silvertop* [1954] Crim.L.R. 205; *R.* v. *Grierson*, *The Times*, July 31, 1954.
[54] Art. 40.

which does not carry a notice permitting smoking[55]; or generally obstruct or impede any person acting in the exercise of his powers or the performance of his duties under this Order.[56] They must also comply with such of the Rules of the Air and Air Traffic Control laid down in Schedule II to the Order as may be applicable to them.[57] The Rules of the Air themselves further contain regulations concerning the use of lights and signals,[58] dropping of objects,[59] and parachute descents from aircraft.[60]

(b) *The crew.* The most important duties in this regard are those imposed on the operating crew to hold appropriate licences,[61] and maintain personal log books,[62] and on all personnel not to be under the influence of intoxicating liquor or drug while on duty.[63]

(c) *The pilot.* He has a special duty to see that the condition of his windows, windscreens or sidescreens is such as not to obscure his own view.[64]

(d) *The person in command.* In addition to his duty to ensure observance of aeronautical regulations governing the aircraft,[65] the person in command is required to take certain precautionary actions before an aircraft flies or attempts to fly,[66] to follow the pre-flight procedure of the General Flight Rules,[67] to follow instructions received by him from Air Traffic Control and generally to act in conformity with such flight and communication procedures as are internationally recognised,[68] to assume direct responsibility to avoid collision with other aircraft when flying in Visual Flight Rules weather conditions, even though the flight may be conducted

[55] Art. 41, as amended by Air Navigation (Third Amendment) Order, 1956 (as a result of this amendment, this provision applies only to United Kingdom registered aircraft).
[56] Art. 63.
[57] Art. 47.
[58] Rule 6.
[59] Rule 17 (this applies primarily within the United Kingdom). See *Ministry of Transport and Civil Aviation* v. *Perrin, Evening Standard*, July 26, 1955.
[60] Rule 18 (this applies primarily within the United Kingdom).
[61] Air Navigation Order, 1954, Art. 21. See *Ministry of Transport and Civil Aviation* v. *Carey, Evening Standard*, July 26, 1955.
[62] Art. 27.
[63] Art. 40.
[64] Art. 17 (3) (this Article applies only to United Kingdom registered aircraft).
[65] See above, p. 191.
[66] Art. 17 (this Article applies only to United Kingdom registered aircraft).
[67] Rules of the Air, Rule 9.
[68] Rule 13.

on an air traffic clearance,[69] and not to permit objects being towed by his aircraft except in accordance with the requirements of the appropriate authority,[70] or anything being dropped from his aircraft in flight which might endanger persons or property on the ground or water.[71] An important provision in regard to the person in command is Rule 25 of the Rules of the Air:

> "The person in command of an aircraft shall be directly responsible for its operation and shall have *final authority as to the disposition of the aircraft* while he is in command, which shall include the *maintaining of discipline of all persons on board*."

It will thus be seen that United Kingdom aeronautical regulations ensure a minimum of law and order on board all aircraft, whether United Kingdom or foreign registered, while they are in or over the United Kingdom, including United Kingdom territorial waters. But the penalties, generally speaking a fine not exceeding £200 or imprisonment not exceeding six months or both, are comparatively mild and the authority of the person in command to act in cases of criminal offence on board his aircraft has not really been laid down with sufficient clarity.[72]

Moreover, apart from these aeronautical regulations, a veritable

[69] Rule 22. [70] Rule 16 (1).
[71] Rule 17 (1).
[72] It may be of interest to note that the Canadian Air Line Pilots' Association has made repeated requests to the Canadian Government for a better definition of the legal status of persons in command of aircraft. At its annual conference in 1958, it noted with concern that the Cuban insurgents had several times taken over airliners in flight (*The Times*, November 17, 1958). See also above, note 1.

The Swiss Federal Air Navigation Act, 1948, contains probably one of the most specific provisions in any municipal law in this regard in its Art. 99:

"(1) If a crime or offence has been committed in Switzerland or outside Switzerland on board a Swiss aircraft engaged in commercial traffic, the captain of the aircraft shall assemble and ascertain the evidence.

"(2) Pending the arrival of the competent authority, he shall make such inquiry as brooks no delay and may, if necessary, arrest the suspected persons, search the passengers and the members of the crew, and seize any objects which may be used as evidence. . . .

"(3) When the aircraft lands abroad after the establishment of the facts, the Swiss consul within whose consular district the place of landing is situated shall be notified; he shall be asked for instructions.

"(4) At the end of the journey, the captain of the aircraft shall report in writing to the Federal Aviation Office on the facts and the inquiry."

The legal status of the person in command of aircraft is another subject at present being studied by the ICAO. See also M. S. Kamminga, *The Aircraft Commander in Commercial Air Transportation* (1953); and below, note 18.

gap appears to exist in regard to the application of the general criminal law to both United Kingdom and foreign registered aircraft while on or over the United Kingdom territorial sea.[73]

Aircraft Outside the United Kingdom

The territorial character of English criminal law means that the extra-territorial extension of its operation and of the jurisdiction of English courts is based on statute.[74] By and large, however, such statutory extensions in English law rest on either the personal sovereignty of the United Kingdom over British nationals abroad, or the quasi-territorial character of British ships and aircraft, apart from the universal jurisdiction of all States over piracy on the high seas.[75] It follows from what has already been said before that, under international law, every State has an almost unlimited power of making its laws extra-territorially applicable.[76]

A. Aeronautical Regulations

In the sphere of aeronautical offences, the law of England presents a fairly comprehensive system of extra-territorial regulation applicable to United Kingdom aircraft when they are abroad.

Section 59 of the Civil Aviation Act, 1949, enables any Order in Council or regulation made thereunder to have extra-territorial operation

> "in so far as it applies to *British aircraft registered in the United Kingdom, wherever they may be*, or prohibits, requires or regulates—
>
> (*a*) the doing of anything by *persons in*, or any of the *personnel of*, *such British aircraft* as aforesaid, *wherever they may be*, or

[73] See above, pp. 189–190 and below, p. 203.

[74] *Cf.* Halsbury's *Laws of England*, Vol. X (Simonds ed., 1955), pp. 317 *et seq.*; Archbold's *Pleading, Evidence and Practice in Criminal Cases* (34th ed., 1959), pp. 27 *et seq.*

[75] *Cf.* Offences at Sea Act, 1536; Piracy Act, 1699, *R.* v. *MacGregor*, 1 C. & R. 429; Piracy Act, 1721; Piracy Act, 1744, *R.* v. *Evans*, 2 East P.C. 798; Slave Trade Act, 1824, as amended by the Statute Law Revision (No. 2) Act, 1888, *R.* v. *Zulueta*, 1 C. & K. 215; see also above, pp. 182, 188; *Re Piracy Jure Gentium* [1934] A.C. 586; C. J. Colombos, *International Law of the Sea* (3rd ed., 1945), pp. 329 *et seq.*

[76] See above, pp. 183–186.

> (*b*) the doing of anything *in relation to such British aircraft* as aforesaid by *other persons being British subjects* or citizens of the Republic of Ireland, wherever they may be."

But it adds:

> "Nothing in this subsection shall affect subsection (1) of section three of the British Nationality Act, 1948 (which limits the criminal liability of certain persons who are not citizens of the United Kingdom and Colonies)."

The problem of jurisdiction is dealt with in sections 60 and 62. Mention has already been made of section 62.[77] Section 60 provides:

> "Any offence under any enactment to which this Part [Part VI] of this Act applies or under an Order in Council or regulation made under either any such enactment or this Part of this Act shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be."

Although section 60, the application of which is thus circumscribed, may appear more limited in scope than section 62, which is applicable to "any offence whatever" without restriction, its field of operation is in practice more extensive than section 62. This is because section 60 is applicable to aircraft of whatever nationality, whilst the operation of section 62 is restricted to "British aircraft." Moreover, in the absence of any general extension of English criminal law to British aircraft abroad, the opportunity of applying section 62 is limited. Such extra-territorial regulations as exist relate essentially to aeronautical offences to which Part VI of the Civil Aviation Act, 1949, and, consequently, section 60 are applicable. But as *R.* v. *Martin* has shown, in order that either section may apply, there must first be an offence under an applicable law.[78]

[77] See above, p. 179.
[78] See above, p. 179.

(1) *Extra-territorial operation based on personal sovereignty*

Section 59 of the Civil Aviation Act, 1949, is implemented by Article 68 (1) of the Air Navigation Order, 1954, in so far as that Order is concerned. Article 68 (1) provides:

> "Except where the context otherwise requires, the provisions of this Order—
>
> ". . .
>
> "(*d*) in so far as they prohibit, require or regulate as aforesaid *the doing of anything in relation to any aircraft registered in the United Kingdom* by other persons shall, *where such persons are British subjects* or citizens of the Republic of Ireland, apply to them *wherever they may be*."

It will be noted that United Kingdom aeronautical regulations are applicable to foreigners abroad only if either they are part of the personnel of United Kingdom aircraft or persons on board such an aircraft.[79] But in so far as British nationals are concerned, subject to the proviso in section 59 of the Civil Aviation Act, 1949, United Kingdom aeronautical regulations are applicable to them *wherever they may be*, even when they are neither on board, nor form part of the personnel of, a United Kingdom registered aircraft.

It is true that many of the offences concerned are in relation to aircraft rather than offences committed on board aircraft. But circumstances can be conceived where British nationals flying in a foreign registered aircraft may act in a manner likely to imperil the safety of a United Kingdom registered aircraft, for instance, by dangerous flying over the high seas. If so, it might be possible to invoke Article 39 of the Air Navigation Order.

(2) *Extra-territorial operation based on the quasi-territoriality of aircraft*

Under this heading, two different situations may be distinguished: (a) United Kingdom registered aircraft as such, and

[79] See above, pp. 182, 184 and 192 *et seq.*, and below, pp. 199 *et seq.*

(b) persons in, and personnel of, United Kingdom registered aircraft.

(a) *United Kingdom registered aircraft.* It should first be mentioned that, whilst under maritime law the British nationality of a ship is determined by the nationality of her owner,[80] in air law the nationality of an aircraft is decided by its place of registration.[81] It is true, however, that no aircraft may be registered in the United Kingdom unless its owner is a British subject or a British protected person.[82]

In so far as aeronautical offences are concerned, Article 68 of the Air Navigation Order, 1954, provides:

> "Except where the context otherwise requires, the provisions of this Order—
>
> "(*a*) in so far as they apply (whether by reference or otherwise) to aircraft registered in the United Kingdom, shall apply to such aircraft *wherever they may be.*"

As has already been mentioned, the authority for the extra-territorial application of such regulations is derived from section 59 of the Civil Aviation Act, 1949, and the matter of jurisdiction is governed by sections 60 and 62.[83]

It has also been mentioned that Article 67 (1) of the 1954 Air Navigation Order explains what is meant by provisions of the

[80] *Cf.* Temperley's *Merchant Shipping Acts* (5th ed., 1954), p. 3: "The term '*British ship*' is not defined in the Act. It would seem, however, that, unless she is employed by a government under letters of marque, the nationality of the owners is generally the criterion of the nationality of a vessel, at any rate so far as regards the duties and liabilities of her owners and persons belonging to her. Hence, a British-owned ship is a British ship for such purposes, even if she is not registered in this country, or if she is registered in, and carries the flag of, a foreign country. . . ."

[81] *Cf.* Air Navigation Order, 1954, Art. 73 (1): ". . . 'British aircraft' means aircraft registered in any part of Her Majesty's dominions."

At the Aeronautical Commission of the 1919 Paris Peace Conference, the British Government had proposed in Art. 3 of its draft international convention on international aerial navigation that "the nationality of an aircraft shall be determined by the nationality of its owner." But the test of registration ultimately prevailed in the 1919 Paris Convention Regulating Aerial Navigation (Art. 6). The same test is also adopted in the 1944 Chicago Convention on International Civil Aviation, Art. 17 of which provides: "Aircraft have the nationality of the State in which they are registered."

[82] Air Navigation Order, 1954, Art. 4 (2). The position of bodies corporate is specifically regulated also.

[83] See above, pp. 195 and 196.

Order being applicable to an aircraft. It means primarily the liability of the operator of the aircraft and of the person in command (unless he is also the operator).[84] It should not escape notice that, while the owner of a United Kingdom aircraft must be British,[85] there is no restriction on the nationality of the operator or of the person in command of a United Kingdom registered aircraft. Consequently, the operator and the person in command of a United Kingdom aircraft, even though they may be of a foreign nationality, will be subject to the Air Navigation Order and to the jurisdiction of English criminal courts, in respect of contraventions of the Order or regulations made thereunder by such an aircraft, whether the aircraft or the individual concerned is in the United Kingdom or abroad. This exercise of extra-territorial juris*faction* is justifiable by the quasi-territorial character of aircraft.[86]

(b) *Persons in, and personnel of, United Kingdom registered aircraft.* The same may be said of that part of Article 68 of the Air Navigation Order, 1954, which provides:

> "Except where the context otherwise requires, the provisions of this Order—
>
> "...
>
> "(*c*) in so far as they prohibit, require or regulate (whether by express reference or otherwise) the doing of anything by persons in, or by any of the personnel of, any aircraft registered in the United Kingdom, shall apply to such persons and personnel, *wherever they may be*."

It may be recalled that four categories of persons are here involved, the person in command, the pilot, the crew, whether or not licensed or a member of the operating crew, and finally all persons on board,[87] including, therefore, not merely passengers, but also unauthorised persons such as stowaways.

[84] See above, p. 191.
[85] See above, note 82.
[86] See above, pp. 182, 184 and 192 *et seq*. It should be noted that some of the provisions are, as indicated, applicable only within the United Kingdom.
[87] See above, pp. 192 *et seq*.

It should be noted that the extra-territorial effect of such aeronautical regulations is based solely on the United Kingdom nationality of the aircraft and applies irrespectively to British and foreign nationals. It matters not also whether the individual concerned, for instance, a passenger on such an aircraft, is or is not travelling to or from a point in United Kingdom territory, provided that, when charged with the offence, he is in England.

Moreover, unless there is a special reservation to the contrary,[88] it is immaterial whether the aircraft is in the United Kingdom or a foreign country, or on or over the high seas. It will thus be seen that on board a United Kingdom registered aircraft, even while it is outside the United Kingdom, United Kingdom aeronautical regulations apply to practically the same extent as they do when the aircraft is in the United Kingdom, whatever the nationality or nationalities of the operator and of the persons on board. In relation to a United Kingdom registered aircraft, these regulations are further applicable to British nationals wherever they may be, whether or not on board a United Kingdom registered aircraft.[89] The nature of these regulations has already been mentioned before.[90] They are doubtless able to maintain a minimum of law and order on board United Kingdom registered aircraft wherever they may be and capable of coping with events such as those in the *Cordova* case had they occurred on board a United Kingdom registered aircraft over the high seas.[91] But what has been said about the operation of the English criminal law in regard to aircraft on or over United Kingdom territorial waters applies also to aircraft outside the United Kingdom.[92]

B. General Criminal Law

Here *R.* v. *Martin*[93] shows that air law lags far behind maritime law and the position can hardly be regarded as satisfactory.

88 These have already been noted in relation to each individual regulation cited.
89 See above, p. 197.
90 As well as reservations regarding their scope of application, see above, pp. 192 *et seq.*
91 See above, pp. 177–178 and 192; *R.* v. *Silvertop* [1954] Crim.L.R. 205.
92 See above, pp. 187 *et seq.*
93 See above, pp. 178 *et seq.*

So far, it appears that, apart from aeronautical regulations, the only statutory provision which deals explicitly with offences on board aircraft is the Treachery Act, 1940.[94]

(1) *Extra-territorial effect based on personal sovereignty*

Many statutes capable of being applied extra-territorially to British subjects abroad doubtless exist, based ultimately on the allegiance of such subjects to the Crown. But, because these statutes have not been drafted with aviation in mind, some curious effects are produced if they are literally construed. Thus, while some English statutes with extra-territorial effect are applicable to British subjects wherever they may be, others apply only if the persons concerned are either *on* foreign land or *on* the high seas.

(a) *British subjects "wherever they may be."* Under this heading may be mentioned[95]: Treason,[96] Official Secrets Acts, 1911 to 1939,[97] Foreign Enlistment Act, 1870,[98] burning or destroying the Queen's ships, etc.,[99] Explosive Substances Act, 1883,[1] murder or manslaughter in two circumstances ((i) death occurring in England resulting from injuries received abroad, or (ii) death occurring abroad resulting from injuries received in England),[2] bigamy,[3] unlawful oaths,[4] receiving or possessing property stolen or unlawfully obtained abroad.[5]

(b) *British subjects "in" a foreign country on the ground or in the air.* Offences by Crown servants.[6]

94 s. 4 (*a*).
95 *Cf.* Halsbury's *Laws of England*, Vol. X (Simonds ed., 1955), pp. 324 *et seq.*; Archbold's *Pleading, Evidence and Practice in Criminal Cases* (34th ed., 1959), pp. 28 *et seq.*
96 Treason Act, 1543, s. 1; 3 Co.Inst. 11; 4 Co.Inst. 124; and see Supreme Court of Judicature (Consolidation) Act, 1925, s. 56 (2); Local Government Act, 1888, s. 89; R.S.C., January, 1903; Treachery Act, 1940, s. 4.
97 ss. 10, 11 of the 1911 and 1920 Act.
98 ss. 4, 7 (1), 16, 17; *R.* v. *Jameson* [1896] 2 Q.B. 425.
99 Dockyard Protection Act, 1772, s. 2.
1 ss. 3, 7 (3).
2 Offences against the Person Act, 1861, s. 10.
3 *Ibid.*, s. 57; *Earl of Russell's Case* [1901] A.C. 446 (H.L.).
4 Unlawful Oaths Acts of 1797 (s. 6) and 1812 (s. 7).
5 Larceny Act, 1916, s. 33 (4).
6 Criminal Justice Act, 1948, s. 31 (1), (2).

(c) *British subjects "on" land or sea outside the United Kingdom.* Perjury or any offence punishable as perjury or subornation or perjury,[7] slave trade.[8]

(d) *British subjects "on" land outside the United Kingdom.* Murder and manslaughter.[9]

It should further be mentioned that English criminal law and the criminal jurisdiction of English courts, at least in regard to acts of treason, are applicable to those who enjoy the protection of the Crown, wherever they may be.[10]

It will readily be seen that this motley of extra-territorial criminal statutes can hardly be considered a satisfactory regulation of offences on board United Kingdom registered aircraft while they are abroad. In this regard, new legislation is urgently required in order to place United Kingdom aircraft at least in the same position as British ships.

(2) *Extra-territorial effect based on the quasi-territorial character of ships and aircraft*

Admirals, from a very early period, exercised jurisdiction over British ships and all persons on board, whether British or foreign. Their authority rested upon Commissions issued by the sovereign. The admiralty jurisdiction has been enlarged successively by legislation, such as the Admiralty Jurisdiction Act, 1391, the Offences at Sea Act, 1536, and the Offences upon the High Seas Act, 1799.

By the Act of 1536, certain offences "committed in or upon the sea, or in any other haven, river, creek, or place where the admiral or admirals have or pretend to have power, authority or jurisdiction" are treated "as if any such offence or offences had been committed or done" in England. Under the Act of 1799, the operation of the 1536 Act has been extended so that now "all and every offence and offences which after the passing of this Act shall be committed upon the high seas, out of the body of any county of this realm, shall be and they are hereby declared to be offences of

[7] Perjury Act, 1911, s. 8.
[8] Slave Trade Act, 1873, ss. 26, 27.
[9] Offences against the Person Act, 1861, s. 9.
[10] *Joyce* v. *Director of Public Prosecutions* [1946] A.C. 347 (H.L.).

the same nature respectively, and to be liable to the same punishments respectively, as if they had been committed upon the shore."

Consequently, English criminal law as a whole is applicable to acts committed on board or by means of British ships, while they are within admiralty jurisdiction, whether the offender be British or foreign.[11] It may also be recalled that the Territorial Waters Jurisdiction Act, 1878, has extended admiralty jurisdiction *ratione personae* to acts committed on board or by means of foreign vessels within the territorial sea of the United Kingdom.[12] In addition, each of the criminal law consolidation Acts of 1861 expressly provides that all the indictable offences mentioned in them, if committed within the admiralty jurisdiction, shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed upon the land in England.[13]

Doubt has already been expressed as to the applicability of the Territorial Waters Jurisdiction Act, 1878, to aircraft.[14] It may equally be doubted whether, except when an aircraft is actually lying on the surface of the sea, any act committed on board a United Kingdom registered aircraft flying over the high seas can be considered as an act committed "in or upon" the sea. Consequently, there is no statute which extends the general body of English criminal law to aircraft over the United Kingdom territorial sea or to United Kingdom registered aircraft while flying outside the United Kingdom.

Finally, mention should be made of section 687 of the Merchant Shipping Act, 1894, which extends the application of English criminal law, in so far as they relate to offences against person or property, extra-territorially to members of the crew of British ships while they are so employed and within three months thereafter, wherever such offences may have been committed outside the United Kingdom. It provides:

11 See *R.* v. *Lopez*, *R.* v. *Sattler*, Dears. & B. 525; *R.* v. *Lesley*, Bell 220.

12 See above, pp. 188 *et seq.*

13 Larceny Act, 1861, s. 115; Malicious Damage Act, 1861, s. 72; Forgery Act, 1861, s. 50; Offences relating to the Coin Act, 1861, s. 36; Offences against the Person Act, 1861, s. 68.

14 See above, pp. 189–190.

> "All offences against property or person committed in or at any place either ashore or afloat out of Her Majesty's dominions by any master, seaman, or apprentice who at the time when the offence is committed is, or within three months previously has been, employed in any British ship shall be deemed to be offences of the same nature respectively, and be liable to the same punishments respectively, and be inquired of, heard, tried, determined, and adjudged in the same manner and by the same courts and in the same places as if those offences had been committed within the jurisdiction of the Admiralty of England. . . ."

This section applies also to offences under the Merchant Shipping Act, 1906.[15]

Conclusion

In sum, it appears that under English law aeronautical offences are well regulated. But the scope of these offences is limited purely to the management, operation and safety of aircraft and the penalty is relatively mild. What seems to be required is the early extension of general English criminal law and jurisdiction to United Kingdom registered aircraft when they are abroad, or at least when they are in *territorium nullius* or over the high seas and to all aircraft on or over the United Kingdom territorial sea. In other words, the counterpart of the Offences at Sea Acts of 1536 and 1799, the Territorial Waters Jurisdiction Act, 1878, and possibly also section 687 of the Merchant Shipping Act, 1894, is in air law urgently needed.

As a suggestion for the solution of problems connected with crimes on board aircraft in their wider context, it is submitted that consideration should be given to the distinction here made between aeronautical offences and the general criminal law.

Among members of the International Civil Aviation Organisation, aeronautical regulations are practically all based on internationally unified rules adopted by the Organisation.[16] But, at

[15] ss. 84, 86. See also s. 686 (1) of the Merchant Shipping Act, 1894, which has also the effect of extending the jurisdiction of English courts extra-territorially to British nationals abroad.

[16] *Cf.* Civil Aviation Act, 1949, s. 8 (1); see further the writer's "Centrifugal Tendencies in Air Law," Vol. X (1957) of this *Annual*, p. 200, at pp. 203 *et seq.*

present, in incorporating these internationally unified rules into their respective national laws, States frequently attach different penalties to the same agreed rules. Further efforts should be made so as to turn these rules into a body of truly uniform laws of a penal character. In appropriate cases, such as acts of violence or other acts endangering the safety of the aircraft or of persons on board, the penalty may well be much higher than for ordinary aeronautical offences. If both the substantive rules and the penalties attached thereto are all internationally uniform, then member States of the International Civil Aviation Organisation may consider entering into a general agreement whereby they will undertake, subject to suitable safeguards, to punish or to extradite to any co-contracting State which makes such a request any person within its juris*action* who either on board or in relation to an aircraft registered in any of the contracting States committed a breach of these internationally unified rules.[17] Such an agreement would go far towards ensuring the prompt and effective enforcement of the aeronautical regulations of the contracting States, and eliminating the rather futile and seemingly interminable discussion

[17] An interesting example of this procedure has been set by the four Geneva Red Cross Conventions of August 12, 1949. Contraventions of certain specified provisions in these Conventions are designated as "grave breaches" and a provision similar to the following is found in each of the four Conventions (Arts. 49, 50, 129 and 146 respectively):

"The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

"Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, *regardless of their nationality*, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, *hand such persons over for trial* to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.

"Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

"In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12th August, 1949" (italics added).

The Geneva Conventions Act, 1957, has been enacted in order to give effect to these Conventions; see further, G. I. A. D. Draper, *The Red Cross Conventions* (1958), pp. 105 *et seq*.

as to which of several States concerned should be allowed and required to assume jurisdiction—the State or registration, the State flown over or the State of first landing.[18]

As regards other offences, notwithstanding the judgment of the Permanent Court of International Justice in *The Lotus* (1927) which recognises that every State has, under international customary law, a universal legislative competence limited possibly only by the "protective" principle,[19] it would seem that in fact many States prefer extra-territorial juris*faction* to be based only on personal sovereignty or the quasi-territorial character of ships and aircraft.[20] Until a better solution can be found by agreement between States, it appears that, for the moment, in order to eliminate possible negative conflicts and to minimise positive conflicts of municipal criminal laws, it would be desirable if pride of place is conceded to the territoriality principle of criminal law so that each State submits acts committed on board all aircraft on or over its territory to its general criminal law. In addition, every State should make its general criminal law applicable to aircraft of its nationality

[18] Nor apparently does the Legal Committee of the International Air Transport Association consider such a discussion very fruitful. In its Report to the 14th Annual General Meeting of the Association at New Delhi in October, 1958, it said: "However, should ICAO persist in the drafting of a convention on this subject, it would be in the interest of the airlines to make certain that nothing in the convention should hamper the ordinary development of transportation. Any new convention should then include certain principles to safeguard the interests of the airlines, such as (a) express authorisation to the carrier or its agents or employees to hand over to the Authorities at a place of landing any passenger accused of the commission of a criminal offence on board the aircraft without involving the carrier or employee in liability; (b) provision that the aircraft, on board which the crime was committed, should not be detained, nor should its crew or passengers be detained in connection with the prosecution of a crime which was allegedly committed on board; (c) provision that the aircraft commander should have adequate authority under all circumstances to ensure the safety of the passengers and aircraft" (26 *IATA Bulletin* (1958), p. 76). See also above, note 72.

[19] See above, pp. 183 *et seq.*

[20] In January, 1929, a communication was submitted to the League of Nations by the International Association of Mercantile Marine Officers expressing the latter's concern regarding the decision in *The Lotus* (1927). The 1940 Montevideo International Commercial Navigation Convention among a number of Latin-American countries submits ships involved in collision on the high seas to the criminal jurisdiction of the respective flag States (Art. 7; Hudson, 8 *International Legislation*, p. 460). This has also been agreed to even more explicitly in the Brussels Convention of 1952 (Knauth, 1 *Maritime Conventions*, p. 43) and the 1958 Geneva Convention on the High Seas (Art. 11).

Attention may also be drawn to the provisions in the 1940 Montevideo Convention on International Penal Law concerning crimes on board aircraft (Hudson, *op. cit.*, above, p. 482).

while they are on or over the high seas or in *territorium nullius*, but should refrain from superimposing its criminal law quasi-territorially on aircraft of its nationality when they are already subject to the territorial law of a foreign State.[21] This would not prevent, however, States from continuing to extend their laws to their subjects abroad on the ground of personal sovereignty or even, in a limited way, to foreigners abroad within the bounds of the "protective" principle.

[21] Mention has already been made of Rule 5 in the Rules of the Air scheduled to the Air Navigation Order, 1954 (see above, note 48). See also some of the solutions adopted by various national laws in note 9, p. 180, above, particularly under I (2), (3) and (4).

BILLS OF LADING

E. R. Hardy-Ivamy

Although for many centuries bills of lading have been one of the principal documents required in international trade, a number of matters relating to them remain unsettled. In recent years the main problems have been concerned with (1) the Carriage of Goods by Sea Act, 1924, (2) the protection of stevedores, and (3) indemnities for false representations in bills of lading.

The Carriage of Goods by Sea Act, 1924

Void Clauses

The Carriage of Goods by Sea Act, 1924, applies to the carriage of goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland.[1] The Act imposes certain responsibilities and liabilities[2] on a shipowner, and he is not allowed to contract out of them.

Article III, r. 8, provides that "any clause, covenant or agreement in a contract of carriage relieving the carrier from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules shall be null and void and of no effect."

Sometimes part of a clause offends against the provisions of the Act and part does not, and the question then arises as to whether severance of the offending part is possible so as to preserve the rest of the clause. In *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama*[3] McNair J. considered that the words of Article III, r. 8, were quite precise and did not admit of any such revision in a case where the Act applied as a matter of law.[4]

[1] s. 1.
[2] By Arts. II, III and IV.
[3] [1956] 1 Q.B. 461.
[4] At p. 476. See also Scrutton, *Charterparties and Bills of Lading* (16th ed., 1955), p. 479: "The result of this Rule may well be to make a clause in a bill

However, if the Act is incorporated contractually into the bill of lading, the position is doubtful. In the same case the learned judge said that if the parties had not in the incorporation clause used language such as "if and to the extent that any terms of this bill of lading are repugnant to or inconsistent with the Act or the Rules, such term is to be void," he could see no method of construction by which such process of revision could take place.[5] But in an earlier case decided by the same judge,[6] where a charterparty incorporated certain provisions of the Australian Sea-Carriage of Goods Act, 1924, the view was expressed that the words of the Act would have to be construed purely as words of contract.

But where the incorporation clause uses words stating that any terms of the bill of lading that are repugnant to or inconsistent with the terms of the Act are to be void, then severance of part of the offending clause has been held to be possible, even when the Act applied as a matter of law in any case.[7]

In some cases, although the terms of the Act have been incorporated by contract, a further clause may be stamped on the bill purporting to exempt the shipowner from liability in certain events, and then the court has to decide whether the words used are sufficiently apt for this purpose.[8]

In recent years the courts, both in this country and in the United States and the Commonwealth, have had to consider whether certain clauses in bills of lading have offended against the provisions of Article III, r. 8, set out above.

One of the cases has concerned an invoice value clause. In *Nabob Foods, Ltd.* v. *The Cape Corso*[9] some black pepper had been shipped from Liverpool to Vancouver, and damage resulted to it in the course of the voyage. The shipowners relied on a clause

of lading which exempts the carrier from liability for which he would otherwise be liable under the Rule totally void, even in respect of operations to which the Rules do not apply."

5 [1956] 1 Q.B. 461, 476.

6 *Minister of Food* v. *Reardon Smith Line, Ltd.* [1951] 2 T.L.R. 1158.

7 *Svenska Traktor Aktiebolaget* v. *Maritime Agencies (Southampton) Ltd.* [1953] 2 Q.B. 295. The clause of the bill of lading in this case stated: "Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss damage or claim arising therefrom."

8 *e.g.*, as in *W. R. Smith & Co., Ltd.* v. *Kheti (Owners)* (1949) 82 Ll.L.Rep. 525 (the effect of an "Onions Clause").

9 [1954] Ex.C.R. 335.

in the bill of lading which said the value of the cargo "in the calculation and adjustment of claims . . . shall . . . be deemed to be the invoice value plus freight and insurance if paid, irrespective of whether any other value is greater or less." The Exchequer Court of Canada held that this clause offended against the Rules, for it purported to substitute for the arrived market value something entirely different; in other words, an entirely new measure of damages for the common law measure, and this lessened the carrier's liability.

The decisions in the United States are similar on this point [10] in relation to the United States Carriage of Goods by Sea Act, 1936, but such a clause would appear still to be valid for the purposes of the Harter Act, 1893. However, if the clause were held to be valid, its universal adoption would lead to certainty and ease of proof, for it is often difficult to assess the market value at the port of destination.

Is the shipowner entitled to discharge the goods at the port of loading if there is a clause to this effect in the bill of lading? In *G. H. Renton & Co., Ltd.* v. *Palmyra Trading Corporation of Panama* [11] the Hague Rules were incorporated in the bill of lading, and one of the clauses provided that "should it appear that . . . strikes . . . would prevent the vessel from leaving the port of loading or entering the port of discharge . . . the master may discharge the cargo at port of loading or any other safe and convenient port. . . . The discharge of any cargo under the provision of this clause shall be due fulfilment of the contract." The cargo was loaded at Vancouver and instead of discharging at Hull or London, which were both strike-bound, the shipowner unloaded it at Hamburg. One of the issues raised in the case was whether the clause set out above was in conflict with Article III, r. 8, and therefore void. It was argued that "carry" means "transport" from one place to another, and that Article III, r. 2, imposed a positive obligation upon the carrier to carry the goods, and that

[10] *American Trading Co.* v. *S.S. Harry Culbreath*, 1952 A.M.C. 1170; *Sanib Corp.* v. *United Fruit Corp.*, 1947 A.M.C. 419. But see *McAllister & Co.* v. *M.S. Marie Bakke*, 1956 A.M.C. 1309 where the argument that the clause was a true valuation clause and not a limitation of liability clause was accepted.

[11] [1957] A.C. 149.

they were not carried at all if they were loaded on the vessel and then discharged at the port of loading. The House of Lords rejected this contention on the ground that "carry" did not mean "transport" the goods,[12] and that carriage began the moment the goods were loaded and before the ship had moved.[13]

Article IV, r. 2, states that "neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from . . . (*n*) insufficiency of packing . . . (*o*) insufficiency or inadequacy of marks." In *British Imex Industries, Ltd.* v. *Midland Bank, Ltd.*[14] some of the clauses in a bill of lading provided that the vessel would not be responsible for the delivery of an iron and steel cargo unless "(*a*) every piece is distinctly and permanently marked with oil paint; (*b*) every bundle is securely fastened distinctly and permanently marked with oil paint and metal tagged so that each piece or bundle can be distinguished at port of discharge." Salmon J. held that it might be that the parties could agree what should be deemed to be adequate marking, but it was not open to them to agree that the goods should be deemed in certain circumstances to be inadequately marked so as to relieve the vessel from liability on that account, if in fact and in truth the goods were adequately marked. Accordingly, in so far as the clause conflicted with that part of the Rule set out above, it was null and void.

In *General Foods Corporation* v. *S.S. Troubadour*[15] a bill of lading contained a clause saying that "if any bagged or baled goods are landed slack or torn, receiver and/or consignee shall accept its proportion of the sweepings. Ship not to be responsible for loss of weight in bags or bales torn, mended or with sample holes." This was held to be null and void because it conflicted with the provisions of the United States Carriage of Goods by Sea Act, 1936.

12 See the definition of carriage of goods in Art. I (*e*): "'Carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship."

13 At p. 173 (*per* Lord Tucker); see also the speeches of Viscount Kilmuir L.C. at p. 166, Lord Morton at p. 171 and Lord Somervell at p. 174.

14 [1958] 1 Q.B. 542.

15 1951 A.M.C. 662 (S.D.N.Y.).

A "Both to Blame" clause [16] contained in a bill of lading to which the Act of 1936 applied was held to be void.[17] The United States Supreme Court considered that it would be anomalous to hold that the cargo owner, who had an unquestioned right under the law to recover full damages from a non-carrying vessel, could be compelled to give up a portion of that recovery to his carrier because of a stipulation enacted in a bill of lading. The very purpose of the clause was to enable one ship to escape its equal share of such losses by shifting a part of its burden to its cargo owners.

Sometimes a bill of lading contains a clause that any dispute arising under it is to be decided by the courts of a named country. Such a clause does not infringe the provisions of the United States Carriage of Goods by Sea Act, 1936, as long as it is a reasonable one. Thus the necessity that an American cargo owner must prove his case in Sweden was held to be a mere incident of litigation and not a prohibited clause, for the vessel in question had been constructed in Sweden and the crew resided there, and evidence as to unseaworthiness was more readily available there. Further, the same measure of damages would be applied in Swedish courts as in American maritime courts.[18] But the Australian Sea-Carriage of Goods Act, 1924, s. 9, invalidates any stipulation ousting the jurisdiction of the Australian courts in respect of any bill of lading relating to the carriage of goods both to and from Australia.[19]

Under the Carriage of Goods by Sea Act, 1924, the maximum liability of the carrier is £100 per "package" or "unit" [20] though

[16] This clause was adopted in 1937 by the North Atlantic Freight Conference and runs as follows: "If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the owners of the said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

[17] *United States of America* v. *Atlantic Mutual Insurance Co.*, 1952 A.M.C. 659.

[18] *Wm. H. Muller & Co. Inc.* v. *Swedish American Line, Ltd.*, 1955 A.M.C. 1687.

[19] *Wilson* v. *Compagnie des Messageries Maritimes* [1954] 2 Lloyd's Rep. 544. A similar provision is to be found in the Canadian Water Carriage of Goods Act, 1910, s. 5, but was not re-enacted in the Water Carriage of Goods Act, 1936.

[20] Art. IV, r. 5.

these words are not defined. However, the £100 limit was raised to £200 by the British Maritime Law Association Agreement of 1950. In the United States an unboxed tractor was held not to be a package,[21] nor was an unboxed locomotive.[22] But a locomotive and tender were held to be a customary freight unit.[23]

In this country no use has been made of the *pro rata* value-loss clause whereby the liability of the carrier is limited for a partial loss to the proportionate share of the statutory limit, but such a clause has been held to be invalid in the United States.[24]

Seaworthiness

The Carriage of Goods by Sea Act, 1924, provides by Article III, r. 1, that "the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(*a*) make the ship seaworthy."

A question that has been brought before the courts in recent years is the conclusiveness of a certificate of a Lloyd's surveyor in order to show that the carrier has exercised due diligence. As the authorities stand at the moment, the certificate is likely to be accepted where it relates to a case in which the owner has built or bought a ship in the first instance, but not where it relates to his duty as to the day-to-day maintenance and upkeep of his ship. In an earlier case[25] Wright J. (as he then was) had said that a shipowner, who had employed surveyors to survey his vessel in the course of her construction, had exercised due diligence to make her seaworthy. He then went on to say that the shipowner might be liable if he employed an architect who failed to detect a definite error in design, but that he would not be liable "for an error on the part of one of the classification societies such as Lloyd's which occupy a public and quasi-judicial position."[26] However, in *Waddle* v. *Wallsend Shipping Co.*[27] Devlin J. held that a Lloyd's

21 *Middle East Agency* v. *S.S. Waterman*, 1949 A.M.C. 1403.
22 *Petition of Isbrandtsen Co. Inc.* (1952) 201 F. 2d 281.
23 *Ibid.*
24 *Pan. Am. Trade & Credit Corp.* v. *The Campfire*, 1946 A.M.C. 1139.
25 *W. Angliss & Co. (Australia) Pty. Ltd.* v. *Peninsular and Oriental Steam Navigation Co.* [1927] 2 K.B. 456. See also *Western Canada Steamship Co.* v. *Canadian Commercial Corp.* (1958) 14 D.L.R. (2d) 487.
26 At p. 462.
27 [1952] 2 Lloyd's Rep. 105.

certificate was sufficient on the ground that to go behind it " would involve a retrogression beyond the point to which a reasonable employer can be expected to go rather than upon the ground that the duty of a Lloyd's Register surveyor is public or quasi-judicial." [28] This ground was recently approved by McNair J. in *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co., Ltd.*,[29] where one of the questions was whether the vessel was unseaworthy in design by reason of the lack of a drain well in the forward part of her hold.

But in a case concerning a charterparty Sellers J. (as he then was) considered that in proving due diligence the owners could not rely on a certificate by a Lloyd's Register surveyor that a full inspection of the ship had been carried out because in fact there had been a complete failure to inspect an air pipe which had fractured and allowed sea water to enter the hold.[30] Further, in *The Assunzione*,[31] which concerned a failure to see that the steering gear and electrical installation were properly maintained, Willmer J. (as he then was) held that it was not sufficient merely to show that the vessel had passed her classification survey or merely to show that the shipowner had appointed a skilled person to examine her. But both these elements were to be considered.

As regards the burden of proof it is prima facie for those alleging unseaworthiness to prove it, but once a shipper has caused the court to feel that it looks as if the ship had been unseaworthy on sailing, then the shipowner is called on to prove due diligence affirmatively. In the earlier cases which concerned leaking boilers, rusty plates or worn out tubing, the case really proved itself against a shipowner. But nowadays there is another type of case, " the functional breakdown," *e.g.*, a complicated internal combustion engine having a delicately balanced heat dispersing system which fails and tears itself to pieces by its immense heat; or a radar installation which goes wrong by its own internal delicacy of

[28] At p. 130.
[29] [1958] 2 W.L.R. 482.
[30] *Minister of Materials* v. *Wold Steamship Co., Ltd.* [1952] 1 Lloyd's Rep. 485.
[31] [1956] 2 Lloyd's Rep. 469, citing with approval the dictum of Hilbery J. in *Cranfield Bros., Ltd.* v. *Tatem Steam Navigation Co., Ltd.* (1939) 64 Ll.L.Rep. 264, 267.

constitution. No one can say that it is obvious that these machines must have been out of order when the ship sailed. Perhaps this fact makes too much difficulty of proof for a shipper, and possibly the law should be altered. But perhaps, on the other hand, to put the burden of proof on the shipowner if his ship ever broke down would render the position too dangerous for shipowners owing to the frequent high value ratio of cargoes to ships.[32]

Whether the shipowner has exercised due diligence to make his ship seaworthy is of course a matter of fact.

In Canada recent cases have been concerned with a lack of lubricating oil in the main engine system,[33] excessive amounts of water in the hold,[34] the thawing out of frozen scupper pipes and causing a fire in the process[35] and a failure to tighten storm valves.[36]

English cases have related to a failure in the ship's steering-gear[37] the blowing out of a boiler tube,[38] and a fault in the ship's design.[39]

In the United States cases on unseaworthiness have included those in which hatchways were not watertight,[40] ventilators not sufficient,[41] heat from a vapour globe in a hold created a condition of combustion[42] and one where there was a failure to instal crack arresters in welded ships.[43]

[32] *De Carvalho & Co., Ltd.* v. *Kent Line, Ltd.* (1951) 32 M.P.R. 282, 305–306 (*per* Dunfield J.) (Supreme Court of Newfoundland).
[33] *Ibid.* See also *Manoel Joaquin de Carvalho* v. *Kent Line, Ltd.* (1950) 26 M.P.R. 77 (Supreme Court of Newfoundland).
[34] *Simmons & MacFarlane, Ltd.* v. *Island Co-op. Services, Co-operative Association, Ltd.* (1955) 36 M.P.R. 279 (Prince Edward Island Supreme Court).
[35] *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.* [1957] S.C.R. 801.
[36] *Australian Newsprint Mills, Ltd.* v. *Canadian Union Line, Ltd. & Union Steamship Co. of N.Z., Ltd. & Burrard Drydock Co.* [1952] 1 D.L.R. 850. See also *Western Canada Steamship Co.* v. *Canadian Commercial Corp.* (1958) 14 D.L.R. (2d) 487 (tail shaft).
[37] *The Assunzione* [1956] 2 Lloyd's Rep. 469.
[38] *Goulandris Bros., Ltd.* v. *B. Goldman & Sons, Ltd.* [1958] 1 Q.B. 74.
[39] *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co., Ltd.* [1958] 3 W.L.R. 482.
[40] *The Guanancita* (1947) 69 F.Supp. 928.
[41] *American Tobacco Co.* v. *S.S. Katingo Hadjipatera*, 1951 A.M.C. 1933. See also *Brown & Williamson Tobacco Corp.* v. *The S.S. Anghyra* (1957) 157 F.Supp. 737 (ventilation system shut down in port blacked out because of war).
[42] *Cargo Carriers* v. *Brown S.S. Co.* (1950) 95 F.Supp. 288.
[43] *Peter Paul Inc.* v. *Christer Salen* (1957) 152 F.Supp. 410.

In New Zealand a shipowner was held not to have exercised due diligence to make his vessel seaworthy in that a suction pipe running through the hold had been allowed to freeze up while filled with water and, when it split, damaged the cargo.[44]

The "Excepted Perils"

By Article IV certain rights and immunities are conferred on a shipowner, but he cannot rely on them[45] if he has not exercised due diligence to make the ship seaworthy and unseaworthiness is the cause of the loss.[46] In addition, no protection is given to him if the loss arises through his negligence or that of his servants, unless this arises in the navigation or in the management of the ship or through fire, provided it was not caused by the actual fault or privity of the carrier; nor is he protected if the vessel makes a deviation not permitted by Article IV, r. 4.[47] A long list of the excepted perils is given in Article IV, r. 2. The exception "navigation or in the management of the ship" has given rise to a number of judicial decisions. In *Riverstone Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co., Ltd.*[48] McNair J. observed *obiter* that if soundings of the water in the hold of a vessel were not taken, that was a matter for which the carrier would not be liable because it was a fault in management. So also does the exception cover a failure (in another case) to use locking bars on the hatches at sea in heavy weather.[49]

In each case, however, the principle to be applied is that, if the cause of the damage is a neglect to take reasonable care of the ship

[44] *B. J. Ball (New Zealand) Ltd.* v. *Federal Steam Navigation Co., Ltd.* [1950] N.Z.L.R. 954.

[45] Except Art. IV, r. 5.

[46] Art. IV, r. 1.

[47] This Article provides: "Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom." Cases on the interpretation of this Rule include *Accinanto, Ltd.* v. *A/S J. Ludwig Mowinckels*; *The Ocean Liberty* [1953] 1 Lloyd's Rep. 38 (deviation owing to strike at port of discharge held to be reasonable) and *Theiss Bros. (Queensland) Pty. Ltd.* v. *Australian Steamships Pty. Ltd.* [1955] 1 Lloyd's Rep. 459 (deviation for purposes outside contract voyage held not reasonable).

[48] [1958] 3 W.L.R. 482.

[49] *International Packers London, Ltd.* v. *Ocean S.S. Co., Ltd.* [1955] 2 Lloyd's Rep. 218. See further *Kalamazoo Paper Co.* v. *British Columbia Pulp & Paper Co., Ltd.* [1950] 2 D.L.R. 369.

or some part of it as distinct from the cargo, the ship is relieved from liability; but, if the negligence is not negligence towards the ship but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.[50]

It is to be noticed that the exception only applies to matters directly affecting the ship as a ship after she has commenced the voyage.[51]

The Act exempts the carrier for loss or damage "arising from inherent defect, quality or vice of the goods."[52] Thus, in a recent Canadian case the carrier was not liable for damage to a cargo of onions, shipped from Melbourne to Vancouver, which arrived in a damp condition. It was proved that they had probably been stored in Australia for six months prior to shipment and that the voyage contemplated in the bill of lading was a long one through the tropics lasting forty-eight days.[53] This was the kind of risk which the Act does not call on the shipowner to bear.[54]

An interesting question has arisen in an Australian case as to the construction of the words used in Article IV, r. 5, which provides: "Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with goods if the nature or value thereof has been knowingly misstated by the shipper in the bill of lading." A cargo of satin chintz and silk brocade was wrongly described in the bill of lading as matting, but the misstatement had been innocently made by the shipper's employee. The court followed the English case of *Armstrong* v. *Strain*[55] which held that, where neither the principal nor the agent was

[50] *Gosse Millard, Ltd.* v. *Canadian Government Merchant Marine, Ltd.* [1928] 1 K.B. 717, 749 (*per* Greer L.J.). This dissenting judgment was approved by Lord Sumner in the House of Lords [1929] A.C. 223, 236, and applied by McNair J. in *International Packers London, Ltd.* v. *Ocean S.S. Co., Ltd.* (see note 49, above).

[51] *B. J. Ball (New Zealand) Ltd.* v. *Federal Steam Navigation Co., Ltd.* [1950] N.Z.L.R. 954, 965.

[52] Art. IV, r. 2 (*m*).

[53] *Easwest Produce Co.* v. *The Ship S.S. Nordnes* [1956] Ex.C.R. 328. See also *Shaw Savill & Albion Co., Ltd.* v. *R. Powley & Co., Ltd.* [1949] N.Z.L.R. 668 (abnormal warping of cask of brandy).

[54] *Bradley & Sons, Ltd.* v. *Federal S.N. Co., Ltd.* (1927) 137 L.T. 266, 271 (*per* Lord Sumner), quoted with approval by Smith D.J.A. in *Easwest Produce Co.* v. *The Ship S.S. Nordnes* [1956] Ex.C.R. 328, 333.

[55] [1952] 1 K.B. 232 (C.A.).

guilty of fraud, there was no way of combining an innocent principal and an innocent agent so as to produce dishonesty. Although there was no fraud in the instant case, Gavan Duffy J. considered that, because the shipper knew the bale contained drapery and the clerk stated that the contents were matting, it was neither common sense nor good English to say that the shipper knowingly misstated the contents.[56]

Except where it is expressly provided for in the Act,[57] the question of the burden of proof in connection with the "excepted perils" is one of considerable difficulty. In New Zealand the Supreme Court, in a case concerning the leakage of a cask of brandy, considered that in order to discharge the onus the shipowner must go the length of establishing such facts as would enable the court to say that the loss apparently fell within the exception. The onus would then be shifted to the shipper to establish negligence on the part of the ship, or facts consistent with negligence, so as to leave it in doubt whether the actual cause of the loss was such negligence, in which case the onus would again be upon the shipowner to disprove negligence.[58]

In an English case Pilcher J. held that if the goods owner proved that the goods shipped had not been delivered or had been damaged after shipment, the carrier was liable unless he could prove affirmatively (i) that he had taken reasonable care of the goods while they were in his custody, and (ii) that the loss or damage fell within one of the immunities specified in Article IV, r. 2.[59]

The Protection of Stevedores

The courts have had to decide whether a shipowner who was not a party to a bill of lading issued by a charterer to a shipper could

[56] *Frank Hammond Pty. Ltd.* v. *Huddart Parker, Ltd.* [1956] V.L.R. 496.

[57] Art. IV, r. 2 (*q*), where the onus of disproving negligence is expressly placed on the carrier. See *Herald & Weekly Times, Ltd.* v. *New Zealand Shipping Co., Ltd.* (1947) 80 Ll.L.Rep. 596.

[58] *Shaw Savill & Albion Co., Ltd.* v. *R. Powley & Co., Ltd.* (1949) (see note 53, above). See also *John Burns & Co., Ltd.* v. *Canadian Explorer* [1928] N.Z.L.R. 767, 785; but *cf. Commonwealth & Dominion Line, Ltd.* v. *Laery, Beveridge & Co., Ltd.* [1928] N.Z.L.R. 141.

[59] *Svenska Traktor Aktiebolaget* v. *Maritime Agencies (Southampton) Ltd.* [1953] 2 Q.B. 295, 303.

take advantage of its terms protecting the charterer[60]; and, in another case, whether he could rely on a contract of affreightment made between him and the buyer of goods f.o.b. in such a way as to escape liability for damage to a seller's goods in which the property had not yet passed to the buyer.[61] But in some recent cases the vexed question has been whether a stevedore can rely on the exceptions in a bill of lading.

An important decision—*Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.*[62]—was given by the High Court of Australia in 1956. In this case the shipowners had provided by the bill of lading that they had no responsibility for a cargo " prior to the loading on and subsequent discharge from the vessel." Stevedores appointed by the shipowners unloaded the goods and owing to negligence in the operation of a mobile crane saturated the goods and rendered them worthless. The question arose as to whether the stevedores were entitled to the benefit of the protection afforded by the bill of lading. The court overruled two decisions of the Supreme Court of New South Wales,[63] and held that the stevedores could not do so. Fullagar J. considered that the stevedore was a complete stranger to the contract of carriage, and it was no concern of his whether there was a bill of lading or not, or, if there were, what were its terms. He was engaged by the shipowner and by nobody else. The shipowner had no authority to bind the shipper or consignee of cargo by contract with the stevedores, and there was no principle deducible from the *Elder Dempster* case,[64] or from any other case, which compelled the inference of any contract between the shipper or consignee and the stevedore. Kitto J. thought that the necessity for the carrier to depend upon others to perform his obligations under the contract suggested a strong reason why he should have desired to stipulate for immunity for himself. But there was no such readily discernible reason why he should

60 *Elder Dempster & Co., Ltd.* v. *Paterson Zochonis & Co., Ltd.* [1924] A.C. 522; see also *Autobuses Modernos S.A.* v. *The Federal Mariner* (1954) 125 F.Supp. 780 (D.C.Pa.).

61 *Pyrene Co., Ltd.* v. *Scindia Navigation Co., Ltd.* [1954] 2 Q.B. 402.

62 [1956] 1 Lloyd's Rep. 346.

63 *Gilbert Stokes & Kerr Proprietary, Ltd.* v. *Dalgety & Co., Ltd.* (1948) 81 Ll.L.Rep. 337; *Waters Trading Co., Ltd.* v. *Dalgety & Co., Ltd.* [1951] 2 Lloyd's Rep. 385.

64 See note 60, above.

concern himself to make, or should be understood as making, a similar stipulation for the benefit of those whom he should engage as stevedores.

The position in the United States has been until now a little obscure. In *A. M. Collins & Co.* v. *Panama R. Co.*[65] in 1952 the United States Court of Appeals, Fifth Circuit, held by a majority that the limitation of liability of the carrier under the United States Carriage of Goods by Sea Act, 1936, was not intended to be personal, but, unless otherwise agreed, extended to any agency by means of which the carrier performed its contract of transportation and delivery, and accordingly a stevedore was entitled to limit his liability, although he was not a party to the bill of lading. However, in a dissenting judgment,[66] Holmes Ct.J. said that the bill of lading " did not confer upon the carrier the power to diffuse partial dispensations to its negligent stevedores or other agents for their wrongful acts."

This case was followed by the Court of Appeals, Second Circuit, in 1954, where a stevedore was allowed the benefit of the one-year period of limitation for claims under the Act of 1936.[67] In the same year the Municipal Court of the City of New York held that a cargo owner who entered into a contract of carriage with a carrier impliedly authorised him to employ all necessary and usual servants and independent contractors, such as stevedores, to perform services on similar terms.[68]

But more recently, in 1958, the United States District Court for the Eastern District of Michigan, Southern Division,[69] has agreed with the dissenting judgment in the *Collins* case.[70] A similar conclusion was reached by the United States Court of Appeals,[71] where

[65] 1952 A.M.C. 2054.
[66] At p. 2061.
[67] *United States* v. *The South Star* (1954) 210 Fed. 2d 44.
[68] *Ford Motor Co.* v. *Jarka Corporation*, 1954 A.M.C. 1095: the court followed the *Collins* case, and also the New South Wales cases of *Gilbert Stokes & Kerr Proprietary, Ltd.* v. *Dalgety & Co., Ltd.* (note 63, above) and *Waters Trading Co., Ltd.* v. *Dalgety & Co., Ltd.* (*ibid.*), but both of them were later overruled in *Wilson* v. *Darling Island Stevedoring & Lighterage Co., Ltd.* (note 62, above).
[69] *International Milling Co.* v. *Steamship Perseus and Nicholson Transit Co.* [1958] 2 Lloyd's Rep. 272 (liability of master to cargo owners).
[70] See above, note 65.
[71] *Krawill Machinery Corporation* v. *Robert C. Herd & Co. Inc.* [1958] 2 Lloyd's Rep. 159.

Sobeloff C.J. observed [72]: "We perceive no incongruity in limiting the liability of the ship and its owners, without similarly limiting the stevedore's liability for its tort. The extent of the latter's liability was apparently not in contemplation in the drafting of the statute, or the bill of lading to which it was not a party." This decision was affirmed in 1959 by a unanimous judgment of the Supreme Court.[73]

In England in the important test case of *Midland Silicones, Ltd.* v. *Scruttons, Ltd.*[73a] Diplock J. held that stevedores were not entitled to limit their liability in tort in respect of a drum of chemical fluid which they had dropped, for they could not rely on the terms of the bill of lading to which they were not parties and for which they had given no consideration to the consignees.

Indemnities for False Representations in Bills of Lading

If a shipowner delivers goods at the port of destination and their owner points out to him that they are damaged, he may reply that he is only liable to pay for such damage as occurred during the voyage, and that he has delivered them in the same condition as that in which he received them.

But if the bill of lading contains a statement to the effect that the goods have been received in "apparent good order and condition," the shipowner will be estopped from denying the truth of this statement as against a holder of the bill of lading, and from alleging that there were at shipment external defects in them which were apparent to reasonable inspection.[74] Accordingly, he will be liable for the difference between their sound value and the actual damaged value which they bear. It must, of course, be shown that the statement was relied on by the person alleging the estoppel, and that he acted on it to his detriment.[75]

[72] At p. 164.

[73] *Robert C. Herd & Co. Inc.* v. *Krawill Machinery Corporation* [1959] 1 Lloyd's Rep. 305.

[73a] [1959] 2 All E.R. 289.

[74] *Silver* v. *Ocean S.S. Co., Ltd.* [1930] 1 K.B. 416 (C.A.). American cases include *Continex Inc.* v. *S.S. Flying Independent & Isbrandtsen Co. Inc.*, 1952 A.M.C. 1499 (S.D.N.Y.); *The Carso*, 1931 A.M.C. 1497 (U.S. Court of Appeals, 2d Circuit); *Freedman* v. *The Concordia Star* (1957) 147 F.Supp. 537 (D.C.N.Y.).

[75] *Silver* v. *Ocean S.S. Co., Ltd.* (see note 74, above).

To meet such a claim from a holder of a bill of lading it is common for the shipowner to take a letter of indemnity from the shippers to cover himself in respect of the condition of the goods. Banks are loth to advance except on clean bills of lading, and to assist trade generally shipowners are willing to accept letters of indemnity, and issue clean bills to satisfy letters of credit. In the short sea trade there is usually not a great deal of time to rearrange letters of credit, and the acceptance of an indemnity assists trade generally. But if the matter concerns a question of quantity and a short loading, the bill of lading would be claused accordingly.[76]

In *United Baltic Corporation, Ltd.* v. *Dundee, Perth & London Shipping Co., Ltd.*[77] the shipowners had given clean bills of lading in respect of some bales of burlap, and were held entitled to recover under an indemnity from the shippers the damages that they had had to pay to holders of the bill, who had acted on the statement in them to their detriment. In *Ben Line Steamers, Ltd.* v. *Joseph Heureux (London) Ltd.*[78] an indemnity agreement was held to be voidable at the instance of the shippers on the ground that there had been an entire misrepresentation of the facts by the shipowners.

It is to be observed that in neither of these cases was any argument put forward that the letters of indemnity were illegal and therefore unenforceable. But this plea succeeded in *Brown, Jenkinson & Co., Ltd.* v. *Percy Dalton (London) Ltd.*,[79] where shipowners had issued clean bills of lading in respect of old and frail barrels, containing orange juice, which they knew to be in a leaking condition. The Court of Appeal held that all the elements of deceit were present because they had made a representation which they knew to be false with intent that it should be acted on, which in fact it was. The consideration was illegal and therefore unenforceable. In the judgment of Morris L.J. there is nothing to indicate whether the position would have been the same if the matters, about which the representation is made, are of a

[76] See the evidence given in *Brown, Jenkinson & Co., Ltd.* v. *Percy Dalton (London) Ltd.* [1957] 1 Lloyd's Rep. 31, 36–37, in the court of first instance.
[77] (1928) 32 Ll.L.Rep. 272.
[78] (1935) 52 Ll.L.Rep. 27.
[79] [1957] 2 Q.B. 621 (C.A.).

trivial nature, or if there is a bona fide dispute where the difficulty of ascertaining the correct state of affairs is out of proportion to its importance. But from the judgment of Pearce L.J. one might gather that in these circumstances the indemnity might be enforceable, though he observed that the shipowners in the instant case went outside these limits. Morris L.J., however, said that each case must depend upon its circumstances, and sometimes indemnities could properly be given, *e.g.*, if a shipowner thinks that he has detected some faulty condition in regard to the goods to be taken on board, and is assured by the shipper that he is entirely mistaken, but agrees to accept an indemnity in case it is later shown that there had been in fact some faulty condition.

Leave to appeal to the House of Lords has been given in this case. It can be observed that the practice of giving indemnities is convenient, yet there is considerable force in the words of Pearce L.J.: "if purchasers and banks felt that they could no longer trust bills of lading, the disadvantage to the commercial community would far outweigh any conveniences provided by the giving of clean bills of lading against indemnities." [80]

A solution of the problem put forward by an American writer is that two bills of lading could be issued for the goods, one for the clean lot, and another for that which is unclean or in dispute. The shipper, if his contract with the purchaser so permits, can substitute a clean lot of cargo within the time-limit allowed, and add the two shipments together. Not infrequently, he can obtain an extension of time to comply with his contract, when it is explained to the buyer and the credit bank that some accident has delayed the complete loading in good order and condition.[81]

This solution is, however, only a partial one, because it does not provide for the short sea routes or cases where speed in shipping the cargo is important.

[80] *Ibid.*, at p. 639.
[81] Knauth, *Ocean Bills of Lading* (4th ed., 1953), pp. 409–412.

THE GENEVA CONVENTIONS AND THE FREEDOM OF THE SEAS

L. C. Green

It is well known that the nations of the world, maritime and non-maritime alike, are somewhat dissatisfied with the present state of the international law of the sea. While they appear agreed on the matters which require examination and possible revision, they are far from being agreed as to what the new law of the sea should be. In this field it is not possible to blame the bipolarisation of the world for the disagreements,[1] for when the League of Nations organised its codification conference in 1930 there was no agreement either[2]; although in their replies to the Questionnaire sent out by the experts a majority of governments showed their support for the three-mile rule.[3] Nearly thirty years have elapsed, and the United Nations Conference on the Law of the Sea which met at Geneva in March and April, 1958, succeeded in producing draft conventions[4] on the territorial sea and the contiguous zone, on the high seas, on fishing and the conservation of the living resources of the high seas, and on the continental shelf. How far States are from true agreement may perhaps be seen by examining the definitions in the drafts. This paper, however, will merely be concerned with these Geneva Conventions and the freedom of the seas.

[1] Schwarzenberger, "The Impact of the East-West Rift on International Law," 36 *Grotius Transactions* (1950), p. 229.

[2] 24 *American Journal of International Law* (1930—Supplement), p. 234.

[3] Bases of Discussion, Point III—L.N.Doc. C.74,M.39,1929.V.

[4] Report on the First U.N. Conference on the Law of the Sea, Cmnd. 584 (1958). For comments on the Conference, see Dean, "The Geneva Conference on the Law of the Sea," 52 A.J.I.L. (1958), p. 607; Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea," 8 I.C.L.Q. (1959), p. 73; Johnson, "The Preparation of the 1958 Geneva Conference on the Law of the Sea," *ibid.*, p. 122; the same, "The Geneva Conference on the Law of the Sea," 13 Y.B.W.A. (1959), p. 68; Whiteman, "Conference on the Law of the Sea," 52 A.J.I.L. (1958), p. 629.

The Territorial Sea

Article 1 of the Convention on the Territorial Sea and the Contiguous Zone states that "the sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea," and it is provided that "this sovereignty is exercised subject to the provisions of these articles and to other rules of international law." This reference to the "rules of international law" is interesting in the light of Article 6 of the 1949 Constitution of the Republic of Costa Rica [5]: "the State exercises complete and exclusive sovereignty in respect of the air space above its territorial waters and continental shelf, in accordance with principles of International Law and with treaties in force." This tends to be in line with the draft Convention drawn up at Geneva. Although this makes no reference, maximum or minimum, to the extent of the territorial sea, it does provide that "the sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil." [6] What Costa Rica understands by "principles of International Law" is indicated by her claim to a continental shelf of 200 miles from the Costa Rican coast,[7] and it is from this limit that the territorial sea is measured.

The draft Convention is more specific with regard to the contiguous zone. Article 24 provides that in the high seas contiguous to the territorial sea a State may exercise control to prevent and punish infringement of its customs, fiscal, immigration or sanitary regulations. It is further provided that this zone "may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." The breadth of the contiguous zone thus varies from maritime State to maritime State, and in the case of a country which maintains a territorial sea of twelve miles there is apparently no room for any contiguous zone. Article 24 is an article that, even if the draft were ratified, may well remain more honoured in its breach than its observance. The international law

[5] 1 *U.N. Laws and Regulations on the Régime of the High Seas* (1951) ST/LEG/SER.B/1, p. 300.
[6] Art. 2.
[7] Decree Law No. 803, 1949, *ibid.*, p. 9.

of the sea at present recognises the validity of "hovering" legislation [8] and this provision goes far towards destroying such legislation. At present, for example, Argentina, Cambodia, (Nationalist) China, Guatemala, Iran, Italy and the United States all claim a region of twelve miles in which to enforce their customs regulations, while Norway claims ten miles and Saudi Arabia eighteen.[9]

The draft Convention provides that the seaward limit of the contiguous zone may not be more than twelve miles from the baseline from which the territorial sea is measured. As this zone is seaward of the outer limit of the territorial sea, there can be little doubt that the maximum extent of the territorial sea must, of necessity, be less than twelve miles.

The High Seas

The failure to define any width for the territorial sea is reflected in the draft Convention on the High Seas. Article 1 lays down that "the term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State"—apparently a simple and straightforward definition. From the point of view of seamen, however, who need to know whether their vessels are on waters no parts of which any State may validly purport to subject to its sovereignty, or whether they have entered a foreign State's territory without permission rendering themselves liable to arrest, no definition could be more circuitous or indefinite. In order to ascertain whether a vessel is in fact on the high seas, it is necessary to know where the high seas begin. It is all very well laying down that the high seas commence where the territorial sea ends, but this has little significance if it is not known where the territorial sea

[8] *Cf.*, *e.g.*, *The Le Louis* (1817) 2 Dods. 210: "Maritime States have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws . . . ," *per* Sir William Scott (Lord Stowell), at p. 245.

[9] See Synoptical Table on the extent of jurisdiction claimed over the territorial sea, the contiguous zone and the continental shelf, prepared for the Geneva Conference, Soc. of Comparative Legislation and International Law, *The Law of the Sea: The Final Act and Annexes of the U.N. Conference on the Law of the Sea, Geneva, 1958* (1958), p. 39.

legally terminates, and if each State regards itself as free to lay down whatever limit it likes from this point of view.

The lack of definition of the territorial sea is equally significant in so far as the Convention of Fishing and Conservation of the Living Resources of the High Seas is concerned. This recognises that, subject to treaty obligations, the rights of coastal States as provided for in the draft, and the articles concerning conservation, all States have the right for their nationals to engage in fishing on the high seas.[10] In order to ascertain the scope of these reservations and of the rights of a State's nationals in this sphere of activity, it is again necessary to know where the high seas begin. The Convention makes provision to protect the interests of States whose territorial sea is adjacent to a part of the high seas in which living resources are to be found.[11] As is perhaps to be expected, however, no attempt is made to define the geographical limits of this interest. Not unreasonably, it is provided that a coastal State may participate on an equal footing in any research project or regulatory system directed at conservation within the area, and this even though its nationals do not fish there. The coastal State may also call upon a State whose nationals do fish to enter into negotiations to regulate the fishery. If such negotiations do not produce agreement within twelve months, a special method of settlement is available at the initiative of either party. Article 7, however, permits the coastal State to take unilateral conservatory measures provided negotiation has not led to an agreement within six months, and these unilateral measures are to remain in force pending the settlement of any disagreement as to their validity or until the decision of a special commission established in accordance with the Convention. In this context it is as well to point out that international law on the judicial level normally requires the parties to a dispute to maintain the *status quo*[12] and the principle of interim measures of protection is "universally accepted by international tribunals."[13] Article 7 seems to be a clear deviation from this rule. States cannot, however, be expected to acquiesce

[10] Art. 1.
[11] Art. 6.
[12] Cheng, *General Principles of Law* (1953), pp. 140–141.
[13] *Electricity Co. of Sofia & Bulgaria* (1939) P.C.I.J., Series A/B 79, p. 199.

indefinitely in a situation which is contrary to their national economic interests. A clearer deviation from a principle formerly laid down by an international tribunal is to be found in Article 11. Contrary to the decision of the World Court in the *S.S. Lotus* (1927), and more in keeping with the criticisms levelled by maritime lawyers against this decision, this provides that penal or disciplinary measures against the master or any other person in the service of a ship involved in a collision on the high seas may only be instituted before the authorities of the flag State or the State of which the individual concerned is a national. Since the preamble declares that the Convention is "generally declaratory of established principles of international law," it is to be presumed that the 1927 decision was a deviation.

The Continental Shelf

Since the publication of the Truman Proclamation of 1945 [14] States have competed with each other as to the extent of the continental shelf over which they claim exclusive rights of exploitation or sovereignty, or which they have described as being appurtenant to their land mass, or as falling within their territorial limits as defined by their constitutions. The concept of the continental shelf is, however, a concept of geology and indicates the fact that land masses do not normally terminate abruptly at the water's edge, but tend to slope away gradually, finally falling away to the sea-bed when the superjacent water reaches a depth of about 100 fathoms or 200 metres.

When Adam made his will he was so unconcerned with the equal rights of all his children, that there are some States where the land mass does in fact end abruptly and there is no continental shelf. This should not be allowed to affect the legal position. However, some States, particularly those on the Pacific coast of Latin America, have not hesitated to lay claim to areas of water without any reference to the geological depth of the continental shelf. Thus Chile, Costa Rica, El Salvador and Peru [15] have each

[14] *Op. cit.*, n. 5, above, p. 38. See also Green, "The Continental Shelf," 4 *Current Legal Problems* (1951), p. 54, at p. 71.
[15] *Op. cit.*, n. 5, above, pp. 6, 9, 300, 16, respectively.

asserted " national sovereignty over all the continental shelf adjacent to the continental and island coasts of [the] national territory, whatever may be their depth below the sea, and claims by consequence all the natural riches which exist on the said shelf, both in it and under, known or to be discovered." [16] These proclamations, to which protests have been lodged by other States, particularly the United States [17] upon whose Truman Proclamation they are allegedly based, assert that the area so affected extends 200 miles from the continental coast. Not only do they claim sovereignty over the shelf and its resources, but these States, while recognising the right of free navigation—not the freedom of the seas—of third States, assert sovereignty over the superjacent seas too. Article 7 of the 1950 Constitution of El Salvador, for example, states: " The territory of the Republic within its present boundaries is irreducible; it includes the adjacent sea within a distance of 200 miles measured from the line of lowest tide, and it embraces the air space above, the subsoil and the corresponding continental shelf. The provisions of [this] section do not affect freedom of navigation in accordance with principles accepted by International Law," [18] presumably overriding the Law of Navigation and Marine, 1933, which recognised " that the high seas are not susceptible of dominion. National dominion shall extend . . . over the adjacent open sea up to a distance of one marine league measured from the low-water mark." [19]

It was on the basis of her 200-mile claim that Peru maintained in 1954–55 her right to exclude the Onassis whaling fleet from the vicinity of her coasts.[20] That Peru did not regard her assertions as being compatible with existing international law is apparent from a statement of her Foreign Minister: " the world must accept the fact that America is elaborating its own code of rights based on social needs which are at variance with the freedom of the seas," [21]

[16] Chilean Presidential Decree (1947), *ibid.*, p. 6.
[17] *Ibid.*, pp. 7 (Chile), 300 (El Salvador), 17 (Peru). For British protest to Costa Rica, see *I.C.J. Pleadings, 1951, U.K.-Norway*, vol. IV, p. 592.
[18] 1 Peaslee, *Constitutions of Nations* (1956), p. 818.
[19] *Op. cit.*, n. 5, above, p. 71.
[20] *Cf.* " Territorial Waters and the Onassis Case," 11 *The World Today* (1955), p. 1.
[21] *The Times*, December 3, 1954.

and the assertion by the Chief of Naval Headquarters at Lima that the payment of the fine imposed upon Mr. Onassis constituted recognition of the Peruvian claim to sovereignty.[22] Nevertheless, despite the protests that were made and the interests of so many countries involved—Argentina, whose national he was, Panama, whose flag the vessels flew, Germany and Norway, whose nationals formed the crew, and the United Kingdom, where the insurance was effected, as well as the maritime and fishing States—Peru was allowed to get away with this.

In connection with such vast claims the borderline between assertions to the continental shelf and an extended territorial sea merges. A claim to a non-existent shelf—for that is what assertions without reference to depth really amount to—extending 200 miles from the coast and belts of territorial sea of the same width leave little to choose between them. In fact the Latin American countries claim a territorial sea to seaward of their vast continental shelf—in the case of Chile this extends to fifty kilometres.[23] Costa Rica makes no such extensive further claim. Instead, she claims sovereignty over her "territorial waters and continental shelf, in accordance with principles of International Law."[24] That the principles of international law on the continental shelf were at least doubtful in 1949, the date of this enactment, is clear from the arbitral award of 1951 by Lord Asquith of Bishopstone in the dispute between *Petroleum Development (Trucial Coast) Ltd. and the Sheikh of Abu Dhabi*.[25] This related to a concession granted in 1939, when "neither contracting party had ever heard of the doctrine of the Continental Shelf, which as a legal doctrine did not then exist." Lord Asquith examined the nature of the claims that had been put forward since 1945 and of the Latin American claims said: these "were often not limited to the Shelf as a geological entity or even to the area ending where the depth of the sea began to exceed 100 fathoms, but sometimes

[22] *Ibid.*, December 14, 1954.

[23] *Supp. to Laws and Regulations on the Régime of the High Seas*, U.N. Doc. A/CONF.13/27 (1958), p. 61.

[24] *Laws and Regulations on the Régime of the Territorial Sea*, U.N.Doc. ST/LEG/SER.B/6 (1957), p. 6.

[25] 1 *International and Comparative Law Quarterly* (1952), p. 247.

extended to a zone 200 nautical miles from the mainland; an area quite unrelated to the width of the physical shelf. In these forms the claims met with protest and resistance." He intimated that the more moderate claims that had been put forward and which rested on some geological foundation tended to be acquiesced in, while "the 200-mile claim seems to be more or less universally discredited." [26] Even with regard to the moderate claims "there are in this field so many ragged ends and unfilled blanks, so much that is merely tentative and exploratory, that in no form can the doctrine claim as yet to have assumed the hard lineaments or the definitive status of an established rule of international law." Lord Asquith recognised that there might well exist a good case for introducing such a doctrine into the body of international law, but he was convinced that in 1951 the draft articles on this matter adopted by the International Law Commission,[27] and which in an amended form [28] were the basis of the Convention adopted at the Geneva Conference, were expressive of the developmental and not the codifying task of the Commission. He therefore could not "accept these Articles as recording, or even purporting to record, established rules: and if they do not, if they are mere recommendations as to what such rules might with advantage be, if adopted by International Convention, they clearly cannot affect the construction of the contract of 1939."

At Geneva the proposals of the International Law Commission bore fruit. Article 1 of the draft Convention on the Continental Shelf provides: "For the purpose of these articles, the term 'continental shelf' is used as referring (*a*) to the sea-bed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (*b*) to the

[26] This comparison between moderate and extravagant claims should be compared with the comments of Sir William Scott when contrasting the legality of claims to exercise "hovering" jurisdiction with "wild claims . . . [that] have been occasionally set up by nations . . . in the East and West Indian seas; . . . extravagant claims to the appropriation of particular seas, founded upon some grants of a pretended authority, or upon some ancient exclusive usurpation," *The Le Louis* (1817) 2 Dods. 210, 244.

[27] 2 *Yearbook of the International Law Commission* (1951), p. 141.

[28] *Ibid.* (1956), p. 264.

sea-bed and subsoil of similar submarine areas adjacent to the coasts of islands." This definition would appear to refute the legality of the Latin American claims, especially as Article 3 provides that the superjacent waters remain high seas. Further, it specifically relates to superjacent waters which permit of exploitation of the natural resources of the sea-bed and subsoil. This definition does not cover the living resources of the water above the shelf, but only "mineral and other non-living resources of the sea-bed and subsoil together with living organisms belonging to sedentary species." [29] It would no more cover the Peruvian whaling areas than it would prestige claims made merely to keep the asserting State in the fashion.

Article 2 recognises that the coastal State "exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources" and expressly declares that such rights "do not depend on occupation,[30] effective or notional, or on any express proclamation." These rights are exclusive and if the coastal State does not explore the continental shelf or exploit its natural resources, any claim or exploitation by another State is dependent upon the express consent of the coastal State. Since the rights over the continental shelf belong to the coastal State *ipso jure* so long as the sea-bed or the subsoil is exploitable, it would appear that every coastal State has an inchoate title to an unlimited area of the sea-bed and subsoil notionally attached to its land territory. This title vests as soon as any State anywhere is technologically able to exploit the sea-bed or subsoil neighbouring its own territory, regardless of whether the particular coastal State is able to exploit that adjacent to itself. Although the draft postulates that "the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas, or that of the airspace above those waters," it makes no attempt to deal with the position of those States which have already declared the superjacent waters of extensive continental shelves, regardless of depth or exploitability, to be part of the national territories as defined in the relevant constitutions.

[29] Art. 2.
[30] *Cf.* Green, *loc. cit.*, n. 14, above, p. 79.

The Rights of Non-Coastal States

The position relating to the continental shelf touches closely upon the problem of the freedom of the seas. By Article 2 of the draft Convention on the High Seas this freedom comprises, for coastal and non-coastal States, *inter alia*, freedom of navigation, freedom of fishing, freedom to lay submarine cables and pipelines, and freedom to fly over the high seas. These freedoms, "and others which are recognised by the general principles of international law," are to be exercised "with reasonable regard to the interests of other States in their exercise of the freedom of the high seas."

The problem of the non-coastal State caused some concern at the Conference. Originally the drafts prepared by the International Law Commission made no provision for the rights of such States, but under the leadership of Czechoslovakia a most effective lobby was organised even before the Conference opened, and their interests were taken into consideration. Under international customary law there is no general recognition of any servitude in a State to cross the territory of another State in order to reach the sea.[31] Similarly, as was made clear in the *Faber* case (1903),[32] this is the customary rule even where a river flows from one State across the territory of another before reaching the sea. The same is true if the route of egress is a railway, and, as the World Court indicated in its advisory opinion on the *Railway Traffic between Lithuania and Poland* (1931),[33] a special treaty would be necessary to guarantee freedom of transit.

Article 3 of the draft Convention provides, however, that "States having no sea-coast should have free access to the sea." It is interesting to note the use of the conditional and the absence of any assertion that non-coastal States have such a right in international law as it exists. In order that non-coastal States shall enjoy equal freedom of the seas with coastal States, the Convention provides that: "States situated between the sea and a State having no sea-coast shall by common agreement with the latter and in

[31] Hyde, 1 *International Law* (1947), p. 618; Oppenheim, 1 *International Law* (1955), p. 466; Schwarzenberger, *International Law*, Vol. I (1) (1957), p. 218. See also, Váli, *Servitudes of International Law* (1958), p. 107.
[32] Ralston, *Venezuelan Arbitrations of 1903* (1904), p. 600.
[33] Series A/B 42, pp. 118–119.

conformity with existing international conventions accord: (*a*) to the State having no sea-coast, on a basis of reciprocity, free transit through their territory, and (*b*) to ships flying the flag of that State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to sea ports and the use of such ports." It is further provided that "States situated between the sea and a State having no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea-coast, all matters relating to freedom of transit and equal treatment in ports, in case such States are not already parties to existing international conventions."

Apart from clearly recognising the equal right of the non-coastal State to enjoy the freedom of the seas, the position of such a State is carried no further forward by the Convention. The enjoyment by the non-coastal State of this right depends upon agreements to be reached in the future and the Convention makes no provision for the procedure to be adopted in the event of a coastal State, allegedly willing to carry out the obligations of this *pactum de contrahendo*, being unable to agree with the non-coastal State on the conditions on which the latter can cross its territory and use its port facilities, for an "obligation to negotiate does not imply an obligation to reach an agreement." [34]

Even if an agreement is reached, a problem still remains with regard to the protection of the ships of a non-coastal State. Normally States are extremely chary of allowing the warships of a foreign State to enter their roadsteads [35] and tend to permit them so to do only from visit to visit and without giving anything in the nature of a *carte blanche* for this purpose. It is true the draft refers to "ships" without specifying whether they are merchant ships or warships, but it is extremely unlikely that coastal States would be prepared to grant freedom of access and port facilities to foreign warships. Unless the warships of a non-coastal State are able to use such facilities, they would be unable to exercise the

[34] *Ibid.*, p. 116.

[35] *The Schooner Exchange* v. *McFaddon* (1812) 7 Cranch 116, 144. See also Gheng, "State Ships and State Aircraft," 11 *Current Legal Problems* (1958), p. 225, at p. 239.

freedom to navigate the high seas or to protect the merchant ships of the non-coastal State on such seas.

A State gains little by being entitled to enjoy freedom of navigation if it is unable to reach the sea. There is equally little to be gained if when the sea is reached it has no vessels under its own flag. Article 4 lays down, therefore, that "every State, whether coastal or not, has the right to sail ships under its flag on the high seas." At first sight this may appear a completely innocuous provision. In fact, however, it is likely to increase the difficulties experienced already with flags of convenience.[36] At present, "any person, whether a Honduran national or an alien, who owns a merchant ship and wishes to register it as a Honduran ship under the Honduran flag shall apply in writing. . . ."[37] Honduras, at least, has a coastline. The draft Convention recognises the right of each State to "fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag." It confirms that ships possess the nationality of the flags they fly, but that "there must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[38] Here we see shades of the decision of the World Court in the *Nottebohm* case (1955), when it was held that the act of naturalisation was not genuine, that there were no real links between Nottebohm and the country of his alleged adoption, and that being so there was no duty upon a third State—Guatemala[39]—to recognise the naturalisation.[40] A nice question arises as to the status of a ship the nationality of which is not recognised because of the lack of any true link between the ship and the State of the flag it flies,[41] especially if that State has no port of its own. Presumably such a

[36] Report of maritime transport committee, Organisation for European Economic Co-operation, *The Times*, February 4, 1958.

[37] Organic Act of the National Merchant Marine, No. 55, March 2, 1943, Art. 5, *U.N. Laws Concerning the Nationality of Ships* (1955) ST/LEG/SER.B/5, p. 76.

[38] Art. 5.

[39] A country which will grant its flag and registry to a foreign vessel, provided it abandons the protection of the former flag: Commercial Code of 1942, Chap. XIII, Art. 5, *ibid.*, p. 73.

[40] *I.C.J. Reports 1955*, p. 4, at p. 26.

[41] Cheng, letter to the Editor, *Manchester Guardian*, March 27, 1958.

ship is to be treated in the same way as one flying two flags. By Article 6 such vessels may be regarded as if they have no nationality at all.

The Right of Approach

In the past what has been described as the "right of approach" has been recognised as belonging to warships in regard to foreign merchant vessels on the high seas.[42] Article 22 of the draft Convention on the High Seas tends to restrain this right. "Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting: (*a*) That the ship is engaged in piracy; or (*b*) That the ship is engaged in the slave trade; or (*c*) That, though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship." It would appear, therefore, that the circumstances in which the *Asya* was seized, and the seizure upheld by the Privy Council in *Molvan* v. *The Attorney-General for Palestine*,[43] would not justify a seizure by the warship of a State which had ratified the Convention, for the *Asya* was not a pirate, nor was she a slaver, nor did she possess British nationality. In fact, she possessed no nationality at all, and a similar decision would not be incompatible with the Convention. Had she a nationality the situation would be different. The Convention apparently does not recognise a right to seize on suspicion of an intention to break the law or on grounds of security —unless of course the smuggling of individuals falls within the purview of "hovering legislation," although such legislation cannot be enforced outside the contiguous zone.

Another matter on which the draft Convention differs from the law of the sea as interpreted by English courts—and of other maritime States, for example, Poland and the United States—is that covered by Article 19, paragraph 5, of the Convention on the Territorial Sea.

[42] Smith, *The Law and Custom of the Sea* (1959), p. 64.
[43] [1948] A.C. 351.

In 1949 when the Polish vessel *Batory* reached Southampton from New York she was boarded by British police officers who, despite the protests of the master, removed Gerhart Eisler to answer extradition proceedings instituted at the instance of the United States.[44] In accordance with State practice the removal of Eisler from the *Batory* would have been compatible with international law even if the vessel had not entered British national waters, but had merely traversed the territorial sea. Thus, in *Re Newman* (1847),[44a] an application by the British Government for the extradition of a fugitive from justice was granted by the United States, the arrest having been effected on a British vessel in United States waters. On this authority, the *Corpus Juris Secundum* points out that "for purposes of extradition . . . a merchant vessel within the territorial waters of the United States is within the territory of the United States, and a subject of the nation to which such vessel belongs may be arrested on a warrant issued by an extradition magistrate in pursuance of proceedings for his extradition."[45] If a national of the flag State may be removed from the vessel, there is little reason to doubt that the same is true of an alien fugitive on board. For States which ratify the Convention, however, this right of arrest for extradition purposes no longer exists if the foreign vessel does not put into a local port, since "the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering territorial waters."

The Problem of Nuclear Tests

Three of the rights inherent in the principle of the freedom of the seas are, in accordance with the draft Convention on the High Seas, the freedoms of navigation, fishing and flight over the high seas.

[44] *Cf.* Green, "Recent Practice in the Law of Extradition," 4 *Current Legal Problems* (1953), p. 274, at p. 284.

[44a] 79 F. 622, cited in Moore, 4 *Digest of International Law* (1906), p. 381.

[45] Vol. 35, s. 30, p. 358.

It has long been recognised that international law permits a fishing fleet to keep its nets down even though another vessel, equally plying its lawful trade on the high seas, should wish to traverse the area in which the fishing is taking place. It is this vessel which has to deviate.[46] Similarly, all the major States accept the fact that naval exercises and gunnery practice may necessitate the closing of areas of the high seas,[47] either on account of the security of the State conducting the exercises or out of considerations of safety for foreign vessels which normally use the waters in question, as happened recently when both NATO and Soviet exercises took place in neighbouring areas and almost contemporaneously.[48] At the same time, problems have not previously arisen when such exercise areas have been closed to aircraft flying over the high seas. In fact, where the latter are concerned there appears to have been acquiescence, despite the formal protests made for the purposes of record by the Soviet Union, in the creation, for security reasons, of air defence inspection zones around the coasts of Canada and the United States, whereby aircraft are obliged to identify themselves on pain of interception.[49]

When nuclear tests are conducted it has become necessary, in view of the dangers of fall-out as well as the natural secretiveness which attaches to such military experiments, to declare vast areas of the high seas closed to all vessels and aircraft,[50] and intruders have been escorted from the danger zone. Ignoring for a moment the problem of radio-activity which is inherent in such exercises, there appears to be no reason why the testing of these weapons should be treated any differently from the testing of weapons of a

[46] See *Dogger Bank* incident, Report of the Hague Commission of Inquiry, 1904, Scott, 1 *Hague Court Reports*, p. 403, at p. 407: "The direction in which this division [of the Russian fleet] was sailing led it nearly toward the main body of the fleet of trawlers, round which and to the south of which it would therefore be obliged to sail. . . ."

[47] Schwarzenberger, "The Legality of Nuclear Weapons," 11 *Current Legal Problems* (1958), p. 258, at p. 288. See also *The Times*, September 4, 1957, for reference to Soviet exercises in the area of the Barents and Kara Seas and the announcement of a closed area in connection therewith.

[48] *The Times*, September 4, 17, 20, 1957.

[49] See Murchison, *The Contiguous Air Space Zone in International Law* (1957); see also Cheng, "The Right to Fly," 42 *Grotius Transactions* (1956), p. 99, at p. 102.

[50] See, *e.g.*, statement by Prime Minister in House of Commons, May 6, 1958, 587 H.C.Deb. 5 s., col. 1037.

more conventional character which has also necessitated the closing of the sea areas. Too frequently in international law it is assumed that new developments warrant the abandonment of old rules of law and the evolution of new rules,[51] with a hiatus until such time as the new rules have been developed. Although international law recognises the validity of the doctrine *rebus sic stantibus* in so far as the law of treaties is concerned, it does not admit of the possibility of those subject to its authority announcing at their discretion that, due to changed circumstances, there is no rule of law applicable. No system of law worthy of the name could accept such a position.[52] What is necessary in such circumstances is that the law be allowed to develop to cover the situation or, if it be possible, the situation be adjusted to fit the rules of law. Nuclear weapons, from this point of view, are merely new weapons and the law which was able to apply to rifles and heavy artillery is equally able to apply to heavy artillery and thermo-nuclear projectiles. If it is legal to test the one and to close security and safety zones for the purpose, it is equally legal to do the same in the case of these new weapons—so long, of course, as all reasonable steps are taken to ensure that other users of the high seas are not unduly interfered with and not unnecessarily placed in danger.

It has been argued that the existence of radio-active fall-out makes a fundamental difference and, of necessity, renders the tests of nuclear weapons illegal. This is not the place to investigate the legality of nuclear weapons.[53] Whether they are legal or not, there is no reason why a State taking full precautions to avoid injury to third States, their nationals or their property should be guilty of any graver breach of law than any other State committing an international nuisance, a nuisance which in some ways may be compared with the noxious fumes produced by the smelter at

[51] *e.g.*, statements at International Law Association Conferences, Brussels, 1948, *Report*, pp. 175, 181; Copenhagen, 1950, *Report*, p. 103; Lucerne, 1952, *Report*, p. 152.

[52] See comment of Portugo-German Arbitral Tribunal in *Naulilaa Claim* (1928) 2 *U.N. Reports of International Arbitral Awards*, p. 1011, at p. 1016 (English translation, Green, *International Law Through the Cases* (1959), p. 627, at p. 628).

[53] See, *e.g.*, Schwarzenberger, *loc. cit.*, n. 47, above, or Singh, *Nuclear Weapons and International Law* (1959).

Trail.[54] If a State takes every reasonable precaution and at the same time, for reasons of additional safety, extends the closed area beyond that of foreseeable danger, it is difficult to contend that it has committed any breach of international law,[55] particularly in so far as persons entering the zone in spite of warnings are concerned.

When viewing this type of situation it is necessary to assess the relative interests of the States concerned. It does not follow that because navigation is older than weapon testing, those who wish to exercise their freedom to navigate have necessarily a prior right over those who wish to exercise their freedom to test weapons. Nor does the fact that the draft Convention on the high seas mentions freedom of navigation specifically make any difference, for after Article 2 has listed this as one of the freedoms enjoyed *inter alia* in the freedom of the high seas, it refers to "others which are recognised by the general principles of international law, [which] shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." There is no inherent reason why it should be any more difficult for an international tribunal to assess the relative importance of the conflicting interests in such a case, than it was for the World Court to assess the relative significance of the economic value of the Norwegian fishing beds for local fishermen as compared with those of foreign fishing fleets which had fished the area for the past four centuries.[56]

In view of the highly controversial political implications of nuclear testing it is hardly surprising that the draft Convention

[54] *Trail Smelter Arbitration* (1938 and 1941) 3 *U.N. Reports of International Arbitral Awards*, p. 1905.

[55] See McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea," 49 *A.J.I.L.* (1955), p. 356, and McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective," 64 *Yale Law Journal* (1955), p. 648. For arguments in favour of the illegality of such tests, see Gidel, "Explosions nucléaires expérimentales et liberté de la haute mer," in *Spiropoulos Festschrift* (1957), p. 173, Margolis, "The Hydrogen Bomb Tests and International Law," 64 *Yale Law Journal* (1955), p. 629, and Radojković, "International Law and Nuclear Tests," 8 *Review of International Affairs* (Belgrade) (July, 1957), p. 7. For a more non-committal view on the legality of tests, see Schwarzenberger, *loc. cit.*, n. 47, above, pp. 288 *et seq.*

[56] Twiss, 1 *The Law of Nations* (1884), p. 301.

makes no reference to the matter. The International Law Commission when preparing the report [57] which formed the basis of the work of the Geneva Conference was similarly hesitant. In its Commentary to this Article [58] the Commission stated that the freedom to fly over the high seas was expressly mentioned since it was felt that this freedom followed directly from the principle of the freedom of the sea. The Commission felt, however, that since its instant task was the codification and development of the law of the sea, to formulate rules on air navigation, even over the high seas, would take it beyond the ambit of the work in hand. Further, the Commission did not "make any express pronouncement on the freedom to undertake nuclear weapon tests on the high seas." Instead, it drew attention to the fact that "States are bound to refrain from any acts which might adversely affect the use of the high seas by the nationals of other States." This provision was narrowed by the Conference to require States to exercise their freedoms merely "with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." [59]

The Commission further drew attention to its draft proposals on pollution of the high seas. Article 25 of the draft Convention states that "every State shall take measures to prevent pollution of the seas from the dumping of radio-active waste" in the light of any standards and regulations laid down on this matter by international organisations. It goes on to provide that "all States shall co-operate with the competent international organisations in taking measures for the prevention of pollution *of the seas or air space above, resulting from any activities* with radio-active materials or other harmful agents." [60] The Convention thus recognises the legality of nuclear experiments and merely requires co-operation from States in preventing pollution as a result thereof. Until such time as the competent international organisations have indicated the measures necessary to prevent such pollution, the States concerned are merely under the general duty not unreasonably to interfere with the rights of others. It should

[57] *Loc. cit.*, n. 28, above, p. 254.
[58] Report, Art. 27, *ibid.*, p. 278.
[59] Convention on the High Seas, Art. 2.
[60] Italics added.

also be remembered that, in accordance with the rules of international law, what is not expressly forbidden is allowed and restrictions on the exercise of State sovereignty must be express and will be narrowly interpreted.[61] Here, one is inclined to say that in view of the wording of Article 25, far from being forbidden the holding of nuclear tests on or over the high seas is expressly allowed. However, the Conference did adopt a resolution[62] pointing out that many States felt nuclear tests constituted an infringement of the freedom of the sea, and "decides to refer this matter to the General Assembly of the United Nations for appropriate action." Apparently, it was felt that because of the political implications involved, the question of the legality of nuclear tests ought properly to be decided not by lawyers but by politicians.

The Anglo-Icelandic Fisheries Dispute

Of more immediate economic interest, at least to the United Kingdom, than the closure of the seas for the purpose of nuclear experimentation, is the situation created by unilateral extension by a coastal State of its territorial sea with the concomitant exclusion of foreign fishermen. The problem of the extent of the territorial sea was that on which the Geneva Conference floundered and the Convention on the subject makes no attempt to define its limits. The United Kingdom, ever since she abandoned her claim to the King's Chambers, delimited by straight baselines joining named headlands,[63] has, with the exception of the needs of "hovering" legislation, only claimed and recognised a territorial sea of three miles and, until the 1930 Codification Conference, this limit was generally recognised as being stipulated by international law. It should be borne in mind, however, that the marine league claimed by Scandinavian countries is one-fifteenth of a degree, or four geographical miles. Where Norway is concerned, as was made clear at the time of the *Fisheries* case,[64] the United Kingdom accepts the four-mile limit. In the case of Denmark, however,

[61] *The Lotus* (1927) Series A/10, pp. 18, 28, 31.
[62] Cmnd. 584 (1958), p. 48.
[63] See Fulton, *The Sovereignty of the Sea* (1911), fig. 4, p. 123.
[64] *I.C.J. Reports 1951*, p. 116, United Kingdom Application, p. 119.

the treaty with Great Britain of 1901 [65] stipulates a three-mile limit for Iceland and the Faroës. This agreement was confirmed for the Faroës as recently as 1955,[66] a matter of no small importance in view of the present attempts being made by the Faroës authorities to extend the territorial sea around the islands to twelve miles. It is not only the Scandinavian countries which decline to accept a three-mile limit. Other claims vary from six to as much as 200 miles.[67]

The International Law Commission had attempted in its draft to find some compromise among these conflicting claims. While recognising that "international practice is not uniform," and pointing out "that many States have fixed a breadth greater than three miles and that many States do not recognise such a breadth when that of their own territorial sea is less," the Commission was of opinion "that international law does not permit an extension of the sea beyond twelve miles." [68]

In an attempt to secure agreement at the Conference, even the United Kingdom was prepared to depart from her traditional advocacy of the three-mile zone. She announced her willingness to accept a territorial sea of six miles, making it clear, however, that the traditional rights of shipping and aircraft would still exist beyond the three-mile limit, and that she would immediately revert to her former practice if the Conference failed to reach agreement. This policy is again being applied. Likewise, the United States, who at Geneva had expressed willingness to go as far as twelve miles, has also reverted to her former practice, as was made clear in her reaction to the announcement of a twelve-mile zone by the People's Republic of China.[69]

Even before the Geneva Conference opened, Iceland had announced her intention to claim a twelve-mile territorial sea. Indications of this had been evident since the World Court in its judgment in the *Fisheries* case said that, in approaching this

65 94 B.F.S.P. 1900–1, p. 29; *loc. cit.*, n. 24, above, p. 771.
66 Treaty Series No. 29 (1955), Cmd. 9457.
67 See Synoptical Table, *loc. cit.*, n. 9, above, p. 39; also Brittin, *International Law for Seagoing Officers* (1956), p. 212.
68 Report, Art. 3, *loc. cit.*, n. 28, above, p. 265.
69 *The Times*, September 5, 1958.

problem, "there is one consideration not to be overlooked . . . : that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage." [70] Unfortunately, "the economic interests peculiar to (the) region (of foreign fishermen), the reality and importance of which are clearly evidenced by long usage," were completely ignored by the Court. Where the fishing beds of Iceland are concerned, a large area of which lies between three and twelve miles of the Icelandic coast, the interests of foreign, and particularly British, fishermen is even clearer. Nevertheless, Iceland has purported to close these waters to all foreigners and since 1958 sought to enforce her laws with the assistance of armed vessels.

The dispute goes back to May, 1952, when Iceland announced an extension of her territorial sea from three to four miles measured from straight baselines, which excluded "British fishing vessels from large areas in which they had been accustomed to fish for more than half a century." [71] Since Iceland refused to negotiate, the United Kingdom declined to recognise this extension which led to a ban upon the landing of Icelandic fish in British ports. This dispute was not settled until November, 1956, when an agreement was worked out with the aid of an informal group set up by the Organisation for European Economic Co-operation. By this agreement limited landings of Icelandic fish were resumed in the United Kingdom and Iceland agreed that no new steps to extend her maritime limits would be taken before the conclusion of the discussions of the General Assembly on the International Law Commission's report on the law of the sea. The United Kingdom made it clear that this agreement did not constitute British recognition of the Icelandic fishery claim.[72] It was further agreed that the Organisation's group would remain in existence to be available in the event of differences arising between the parties. Since Iceland has not referred her latest claims to this group there would appear to be a breach of this agreement. Further, since the Geneva Conference resolved to recommend to the General

[70] *I.C.J. Reports 1951*, p. 116, at p. 133.
[71] *The Times*, May 5, 1952.
[72] *Ibid.*, November 15, 1956.

Assembly that it consider convening a second conference—which is to meet in 1960—it is arguable whether the discussion by the Assembly of the Commission's report on the law of the sea has yet concluded. At the end of May, 1958, Iceland announced a twelve-mile limit [73] which has been contested by, among others, the United Kingdom, France, Spain and the Federal German Republic.

One of the alleged grounds for the Icelandic extension is over-fishing, although the area was not closed to Icelandic fishermen, and no suggestion was put forward for an agreement on the quantity of fish to be taken from the area. In this connection, the draft Convention on Fishing and Conservation of the Living Resources of the High Seas is of interest. This recognises that a coastal State has a special interest in the productivity of the high seas adjacent to its territorial sea and provides that it may, with a view to maintaining this productivity, take unilateral measures of conservation, provided that negotiations with the other States concerned have not borne fruit within six months. Such negotiations must, of course, be conducted with good faith on both sides. It is further stipulated that the measures so taken shall not discriminate "in form or in fact" against foreign fishermen, and that if the measures are rejected by the other States concerned the special conciliation procedure envisaged by the Convention shall come into operation, although in the interim the measures remain in force.[74]

It is, of course, clear that all maritime States are interested in problems relating to the territorial sea, and all fishing States are concerned in the problem of the Icelandic waters. Perhaps the most reasonable way of solving this problem is by way of a regional international understanding. Another possible solution might be along the lines of the temporary agreement between the United Kingdom and Denmark in regard to the Faroës fishery—an exclusive fishing limit of six miles for Faroese and Danish craft, with British vessels permitted to join these in the area between six and twelve miles, save in three areas where, inside a twenty

[73] *Ibid.*, May 29, 1958.
[74] Arts. 6 and 7. See also above, text to nn. 11-13.

mile limit, only Faroese linefishers will be allowed.[75] It appears that Iceland—or her Communist Fisheries Minister[76]—has already rejected a somewhat similar suggestion.

In accordance with international law, and this relates not only to the Icelandic extension of the territorial sea, but to every similar predatory action by a single State, no State is entitled to extend its own rights under that law or to limit the rights of any other State.[77] Every such extension or limitation requires recognition by the State affected before it has any validity.[78] Furthermore, the affected State, subject to any limitations that may be incumbent upon it under the Charter of the United Nations or other treaties, is entitled to resort to all measures necessary to vindicate its rights and to protect the enjoyment of their rights by its nationals. It may well be, however, that, in words that have been applied to some of the foundations on which the World Court rested its decision in the *Fisheries* case,[79] "extra-judicial considerations" counsel hesitation in resorting to such measures.

[75] *The Times*, February 25, April 28, 1959. See, *ibid.*, September 25, 1958, for Faroese rejection.
[76] See, *e.g.*, *ibid.*, October 15, 1958.
[77] See, *e.g.*, *The Zamora* [1916] 2 A.C. 77.
[78] See Schwarzenberger, "The Fundamental Principles of International Law," 87 *Hague Recueil* (1955), p. 195, at pp. 228-229.
[79] *I.C.J. Reports 1951*, Index, p. 282.

PROBLEMS OF A UNITED NATIONS FORCE

GEORG SCHWARZENBERGER

THE creation of the United Nations Emergency Force (UNEF) in the wake of the Suez interventions of 1956 was a piece of imaginative improvisation. Its very success rekindled interest in the half-forgotten pattern of an international force and encouraged exploration of its potentialities in the setting of contemporary world organisation.[1]

In this formative stage the New York University Conference, 1958, of the International Law Association, provided an instructive testing ground for diverging views on this topic.[2] The Conference recognised that the time for drawing a reasoned balance-sheet on a United Nations Force had drawn near. It, therefore, requested the Association's Charter Committee to report on the matter to the next Conference.[3] All that was then still lacking was Mr. Hammarskjöld's slightly delayed Report on the lessons of the UNEF experiment. This is now available.[4] It provides an opportune

[1] See, for instance, Armstrong, "The United Nations Experience in Gaza," 35 *Foreign Affairs* (1957), pp. 600 *et seq.*; Appadori, *The Use of Force in International Relations* (1958); A.S.I.L., *Report of Committee on Study of Legal Problems of the United Nations*, Proceedings, Am.Soc.Int.Law (1957), pp. 205 *et seq.*; Clark and Sohn, *World Peace Through World Law* (1958); Dunbar, "Legal Questions involved in the Creation of a Permanent U.N. Force," in David Davies Memorial Institute, *Niblett Hall Conference 1958*, pp. 37 *et seq.*; Federal Union, *Proposals for a Permanent United Nations Force* (1957); Frye, *A United Nations Peace Force* (1957); Goodrich and Rosner, "The United Nations Emergency Force," 11 *International Organisation* (1957), pp. 413 *et seq.*; Green, "The Double Standard of the United Nations," 11 *Year Book of World Affairs* (1957), pp. 104 *et seq.*; Holcombe and Others, *Strengthening the United Nations* (1957), pp. 86 *et seq.*; Macdonald, "Hungary, Egypt and the United Nations," 35 *Canadian Bar Review* (1957), pp. 59 *et seq.*; McDougal and Feliciano, "International Coercion and World Public Order," 67 Yale L.J. (1958), pp. 771 *et seq.*; Pearson, "Force for U.N.," 35 *Foreign Affairs* (1957), pp. 395 *et seq.*; Scheuner, "Eine Internationale Sicherungsmacht im Dienste der Vereinten Nationen," *Makarov Festgabe* (1958), pp. 398 *et seq.*; Sohn, "The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force, 52 A.J.I.L. (1958), pp. 229 *et seq.*; J. Stone, *Aggression and World Order* (1958), and Susan Strange, "Suez and After," 11 *Year Book of World Affairs* (1957), pp. 76 *et seq.*

[2] *Report of the 48th Conference* (New York, 1958—in the press).

[3] *Ibid.*

[4] U.N.Doc. A/3943 (October 9, 1958), subsequently cited as *Report*.

basis for the next phase in an animated and constructive cross-frontier discussion.

I. Questions of Method

In the *Report*, the Secretary-General raises squarely such problems as the lessons to be learned from UNEF, its significance as a precedent for future United Nations practice, the advisability of stand-by agreements embodying principles and rules of permanent value, and the potential usefulness of a permanent force on the UNEF model.

Even if, as is proposed, the emphasis in this paper is on the legal, constitutional and institutional aspects of these questions, it is plain that clearly some of the issues which arise in this context cannot be answered adequately, if at all, on the level of *lex lata*. If this were a legitimate objection to their treatment by, and between, lawyers, it could be raised in relation to any proposal of significance in the sphere of the "development"[5] or "advancement"[6] of international law.

It would be repetitive to say at this point more than that the conventional distinction between "legal" and "political" is somewhat dated. It will always remain necessary to distinguish articulately between propositions *de lege lata* and *de lege ferenda*. Actually, the need for this was hardly ever greater than it is at the present time.[7] For a considerable period, however, it has been possible to deal with questions *de lege ferenda* more constructively than by their sterile dismissal as "political." Indeed, this attitude itself is becoming increasingly suspect as a political ideology which, behind a virtuous façade of *non possumus*, hides a *non volumus* that is more often than not sadly tainted by an entertaining variety of vested interests.[8] All that is necessary to avoid prescientific

[5] Art. 13 (1) (*a*) of the U.N. Charter.

[6] Art. II of the Constitution of the International Law Association, *loc. cit.*, note 2, above. *Cf.* also Art. 1, *Statuts de l'Institut de Droit International* (46 *Annuaire* (1956), p. xxvii).

[7] See further 9 *Current Legal Problems* (1956), pp. 235 *et seq.*

[8] For perceptive observations on sectional interests, real and imaginary, which, in the view of a number of member States of the United Nations, militate against proposals for a permanent United Nations Force, *cf.* Frye, *loc. cit.*, note 1,

politics of both positive and negative hues is to treat problems *de lege ferenda* on a commensurate inter-disciplinary level of international studies.[9]

II. Principles and Tactics

The elasticity of mind which is displayed in the *Report* evokes admiration. It has, however, led to a certain amount of probably unavoidable obscurity on the character of the principles and rules elaborated in the *Report*.

At one time, Mr. Hammarskjöld considered it advisable to ask the General Assembly for endorsement of those principles and rules which would provide an adaptable framework for future operations of a similar character. They could then be incorporated into general stand-by arrangements.[10] As, however, the Secretary-General subsequently explained to the Special Political Committee of the General Assembly, he no longer considered it necessary for the General Assembly at this stage to take any action on the *Report*.

above, pp. 34 *et seq.*, and, on the reasons behind the Indian attitude to UNEF, Green, *loc. cit.*, note 1, above, pp. 122 *et seq.*

A systematic study of these attitudes would constitute a valuable contribution to the better understanding of the character of the interests retarding international integration on the United Nations level.

[9] See further *loc. cit.*, note 7, above, pp. 250 *et seq.*, and 6 *Year Book of World Affairs* (1952), pp. 258 *et seq.*

When, in the context of proposals *de lege ferenda*, lawyers use the term "political," they usually have in mind one or more of five different meanings:

(1) "Political" as a synonym for *non-legal*. See, *e.g.*, Lord McNair in David Davies Memorial Institute, *Niblett Hall Conference 1958*, pp. 49–50.

(2) "Political" as a synonym for *discretionary*, as distinct from being bound by legal norms. See, *e.g.*, the joint Dissenting Opinion by four Judges, including Sir Arnold McNair, as he then was, in the Advisory Opinion of the International Court of Justice on *Admission of a State to the United Nations*, *I.C.J. Reports 1948*, p. 57, at p. 85.

(3) "Political" as a synonym for *qualities characteristic of a social phenomenon*. See, *e.g.*, the Advisory Opinion of the International Court of Justice on *Reparation for Injuries*, *I.C.J. Reports 1949*, pp. 177 and 179.

(4) "Political" as a synonym for *scientifically unverifiable*, as, for instance, in specific proposals *de lege ferenda*. This attitude may be due to lack of faith in, or acquaintance with, the available inter-disciplinary techniques.

(5) "Political" as a synonym for proposals which are *objectionable* on undisclosed grounds.

For illustrations of uses of these terms in the meanings set out under (4) and (5) which, as published, may be less telling than the actual interventions, *cf.* the summaries of the Sessions on the United Nations Charter and of the Closing Session of the New York Conference of the I.L.A. (*loc. cit.*, note 2, above).

[10] *Report*, ss. 152–154 and 193.

This would best be left until, at some future date, the United Nations might have to decide on field operations of a comparable nature.[11] Whenever such a contingency arises, policies will have to be decided at short notice. Therefore, while these issues are of a purely hypothetical character, this is probably the right time for a closer examination of these principles and rules.

Some of the principles and rules set out in the *Report* are derived from comparisons between UNEF and a number of other relevant United Nations field operations in the Near East: the United Nations Truce Supervision Organisation (UNTSO), created in 1948 and entrusted with the task of watching over observance of the cease-fire in Palestine, the Egyptian-Israel Mixed Armistice Commission (EIMAC), serviced by UNTSO and concerned with the investigation of complaints and incidents under the Egyptian-Israel Armistice Agreement of 1949 and, finally, the United Nations Observation Group in the Lebanon (UNOGIL—1958).

A number of the principles and rules invoked in the *Report* bear the epithets "basic" or "guiding." While a few are thought to be reflected in the structure and Charter of the United Nations, others are attributed to the General Assembly. Others, again, are described as having been evolved in practice or in negotiations with the Egyptian Government. Occasionally, what, in one place, is termed a principle, is labelled elsewhere a United Nations policy.

Appropriately enough, the test applied for including a principle or rule in the *Report* was its value in situations which might call for adoption of the UNEF pattern. Thus, there was even wisdom in not being unduly specific on the legal, or any other, basis of these principles and rules. Occasionally only, references are made to the character of a practice as having established a "constitutional pattern"[12] or to "general legal principles" which, for instance, were "recognised as decisive for the deployment of the Force."[13]

In an even more remarkable display of virtuosity, Mr. Hammarskjöld a few weeks later informed the Special Political Committee of the General Assembly at one and the same time that his approach

[11] U.N.Doc. A/SPC/SR.100 (November 5, 1958), p. 4.
[12] *Report*, s. 171.
[13] *Ibid.*, s. 62.

to the problem was guided by the strictest respect for the rules of the Charter, that it did not involve, even by implication, the creation of any new obligations for member States, that it did not affect, or seek to affect, the competence of United Nations organs or their interrelations under the Charter and, finally, that it did not presume to lay down legal rules binding in all circumstances.[14]

Three main propositions run through the Secretary-General's *Report*. First, it is possible to establish and operate *ad hoc* forces on the UNEF pattern in the existing framework of the United Nations Charter. Secondly, it would be advisable to incorporate some of the principles and rules elaborated in the *Report* into more permanent stand-by agreements. Thirdly, little would be gained by establishing a permanent force of the UNEF type. Each of these theses calls for sympathetic, but critical, examination.

So as not to obscure the wood by the trees, discussion in this paper will be restricted to an analysis of the *Report* in relation to three key-problems: the functions of a force of the UNEF type, the United Nations organs entitled to establish such a force and, finally, some of the questions arising from its operation.

III. The Functions of UNEF

It would not be unduly difficult to imagine types of a United Nations force which it would be clearly beyond the competence of any organ of the United Nations to establish or operate. For instance, if, with the requisite majorities, the Security Council or the General Assembly chose to create a United Nations force for the purpose of deporting to Antarctica or a penal colony on the moon unkind critics of the United Nations met on its premises, such a decision would probably be unconstitutional. Conversely, it would probably be accepted as within the power of an organ of the United Nations to create a force limited to the task of the observation of matters within the jurisdiction of that organ and operating exclusively on, or above, the high seas. Thus, a direct connection exists between the functions envisaged for a United Nations force and jurisdiction to establish such a body.

[14] *Loc. cit.*, note 11, above.

The functions of UNEF, which is still discharging unobtrusively its appointed tasks, are not limited to mere observation, but fall short of *initiating* military action. Discharge of these tasks presupposes agreed cease-fire conditions as well as time-tables for the withdrawal of interventionist forces and the advance by the former sovereign or occupant into territories vacated by the other side. Equipment of UNEF with fire power on the regimental level with authority to use its weapons in self-defence against armed attack [15] distinguishes this Force from an observer corps in uniform.[16]

Once interposed between the former combatants in movable and gradually shrinking buffer zones, the Force has been able to fulfil a dual function. In the first phase, it has supervised the cease-fire and the withdrawal of the interventionist forces from Egypt and the Gaza area. Subsequently, deployed on the Egyptian side of the Armistice Demarcation Line in the Gaza area and to the South along the international frontier, it has been a major factor in preventing any serious renewal of fighting between Egypt and Israel.

The fact that, by and large, the mere presence of UNEF has, so far, been sufficient for the discharge of these tasks does not reduce the Force to a mere observer corps. The presence of a body of armed men in positions in which they can fulfil their appointed functions, if need be, by exercising the right of self-defence is something very different from that of a practically unarmed observer corps. The duties of UNEF are not limited to the

[15] "The rule is applied that men engaged in the operation may never take the initiative in the use of armed force, but are entitled to respond with force to an attack with arms, including attempts to use force, to make them withdraw from positions which they occupy under orders from the Commander, acting under the authority of the Assembly and within the scope of its resolutions" (*Report*, s. 179). See also *ibid.*, ss. 70, 71 and 178.

As the assumption is that the Force operates only under agreed cease-fire conditions, which presupposes acceptance by the parties of any relevant resolutions passed by the General Assembly (*cf.* below under VI), this definition of self-defence is correct and an instructive confirmation of the thesis that, if the other conditions of the exercise of the right of self-defence are fulfilled, this may involve the defence of *any* right under international law. See further Hague Academy of International Law, *Recueil*, Vol. 87 (1955), pp. 327 *et seq.*

[16] The functional differences between an interposition force and an observer corps emerge clearly from a comparison between the *Reports* on the activities of UNEF and UNOGIL (*cf.*, for instance, U.N.Docs. A/3568, 3694 and 3899 with S/4100). See, also, the *Annual Report*, 1957–58, by the Secretary-General (A/3844), p. 11.

discharge of these military or para-military tasks, but include the fulfilment of incidental administrative functions within the limits of the governing General Assembly Regulations. It is not, however, one of the purposes of the Force, otherwise than by assisting in the agreed withdrawal of the interventionist forces, to influence the existing military and political balance between the parties.[17]

IV. Authority to Establish an Interposition Force

The organs of the United Nations which require consideration as entitled to establish an international force on the UNEF pattern are the Security Council, the General Assembly and the Secretary-General.[18]

(a) The *Security Council* may create an interposition force in any one of seven different ways:

(1) *A recommendation to member States under Article 39 of the Charter.* The three Resolutions leading to the establishment of the Unified United Nations Command in Korea are silent on their legal foundation.[19] In each, references are made to a "breach of the peace" and an "armed attack." While the one points to Article 39 of the Charter, the other recalls Article 51. Once the Security Council makes a recommendation under Article 39, member States do not require any further authority under the Charter to act in compliance with such a recommendation. Yet their legal case cannot but be strengthened by such action being within the rights of member States even in the absence of such a recommendation if the circumstances also fulfil the conditions of collective defence

[17] *Cf. Report*, ss. 10, 23, 51 *et seq.*, 77 *et seq.* and 149. See further Gen.Ass. Resolutions 1000 (ES–I)—November 5, 1956, 1001 (ES–I)—November 7, 1956 and 1125 (XI)—February 2, 1957, the *Second and Final Report* by the Secretary-General on the Plan for an Emergency International U.N. Force, November 6, 1956 (U.N.Doc. A/3302), ss. 8 and 12; the *Report* by the Secretary-General of January 15, 1957, on Compliance with Gen.Ass. Resolutions (A/3500), ss. 11 and 16, and the *Report* by the Secretary-General in pursuance of Gen.Ass.Res. 1123 (XI), January 24, 1957 (U.N.Doc. A/3512), ss. 5, 7 and 29. See also below under VI.

[18] In clarifying his own mind on the issues raised under this heading, the writer found a number of the papers enumerated in note 1 especially illuminating, in particular, the A.S.I.L. Report and those by Professor Scheuner, Professor Sohn and Professor Stone.

[19] Resolutions of June 25, 1950 (U.N.Doc. S/1501), June 27, 1950 (U.N.Doc. S/1511) and July 7, 1950 (U.N.Doc. S/1588).
For a selective bibliography of relevant literature, *cf. loc. cit.* note 2, above.

against armed attack under Article 51 of the Charter. The essential point is, however, that even if the conditions of Article 51 had not been fulfilled in the case of Korea, a recommendation of the Security Council under Article 39 would have justified the creation of a fighting force of the Korean type. *A fortiori*, it would have provided the necessary basis for the establishment of a mere interposition force.

(2) *A decision under Articles 39 and 41 of the Charter.* It is possible to describe an interposition force as a measure "not involving the use of armed force" in the meaning of Article 41. The emphasis is then put on the primary functions of such a body which can be fulfilled without any resort to armed force. On this assumption, the fact that the force may use its weapons in self-defence, affects its status as little as does a civilian's exercise of his right of self-defence under municipal law.

(3) *A decision under Articles 39 and 42 of the Charter.* It is permissible to argue that the above attempt to play down the military element of a well-armed interposition force lacks frankness. In this view, whether armed for defensive or offensive purposes, a force on the UNEF model is an armed force and, therefore, falls under Article 42 if established by the Security Council. Yet nothing in the wording of Article 42 suggests that the creation of armed forces under this Article depends either on the special agreements referred to in Article 43 or on the proper functioning of the Military Staff Committee provided for in Article 47. Thus, in the context of action initiated by the *Security Council*, it makes little difference whether an interposition force is considered a military or, as in relation to UNEF—operating as it does under the aegis of the *General Assembly*—the United Nations Secretariat definitely prefers, a para-military force.

(4) *A decision under Article 48 of the Charter.* Under paragraph 1 of this Article, all member States or some of them, as the Security Council may determine, have to take the action required to carry out the decisions of the Security Council for the maintenance of international peace and security. Provided that the Security Council has made the requisite prior decision, the action

subsequently taken may well consist in the creation of an interposition force staffed by all or some of the member States.

(5) *A decision under Article 53 of the Charter.* Under this Article, the Security Council may utilise regional arrangements or agencies for enforcement action under its authority. Even if an interposition force were not regarded as a typical enforcement force, the *a fortiori* argument suggested above would appear to cover such a force.[20]

(6) *A decision under Article 40.* Even without making a recommendation or decision under Article 39, the Security Council may under Article 40 take provisional measures to prevent the aggravation of a situation which involves a threat to peace or a breach of the peace. Such measures are without prejudice to the rights, claims or position of the parties concerned. Situations easily come to mind when an interposition force may well fulfil such an interim function.

(7) *A decision under Article 29.* This entitles the Security Council to establish an *ad hoc* or permanent interposition force as a subsidiary organ for the better performance of its own functions.

In the opinion of the States belonging to the Soviet bloc, the Security Council alone has authority to establish United Nations armed forces. Although these member States have abstained from voting on the resolutions establishing UNEF, they maintain that UNEF has been constituted in flagrant violation of the United Nations Charter.[21] In view of this attitude, it is understandable that great pains have been taken in the United Nations Secretariat to play down the military character of UNEF and to express horrified indignation at the mere thought that UNEF has anything in common with a peace enforcement force. Yet it is hardly possible to be dogmatic on this matter.[22] A truer, but pragmatically less acceptable, answer to the Soviet charge would

[20] See under (1), above.

[21] For the latest reiteration of these arguments, *cf.* the somewhat repetitive speeches by the Albanian, Bulgarian, Czechoslovak and Rumanian representatives in the wake of the leading speech by the Russian representative in the Special Political Committee of the Gen.Ass., November 1, 1958 (U.N.Doc. A/SPC/SR.97), and November 4, 1958 (*ibid.*, SR.98).

[22] See under (2) and (3), above.

probably be to suggest a less impressionist perusal of the text of Article 24 (1) of the Charter. While, under this Article, the Security Council is entrusted with "primary" responsibility for the maintenance of international peace and security, this wording makes it plain that the Security Council has not been given a monopoly in this field.[23]

(b) A number of heads under which the *General Assembly* may claim jurisdiction to establish an interposition force call for scrutiny:

(1) Under Article 11 (1) of the Charter, the General Assembly may consider the general principles of co-operation in the maintenance of international peace and security and make recommendations regarding such principles to the member States or to the Security Council or to both. This Article enables the General Assembly to work out outlines of stand-by arrangements for *ad hoc* forces on the UNEF pattern and of more far-reaching schemes for a permanent United Nations force.[24]

(2) Under the omnibus clause of Article 10 of the Charter, the General Assembly may discuss any aspects of *ad hoc* or permanent United Nations forces and make recommendations to the member States or to the Security Council or to both.

(3) Provided that the Security Council is not seised of a dispute or situation, the General Assembly is entitled under Article 14 of the Charter to recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations. Such situations include those resulting from a violation of the Purposes and Principles of the United Nations which are laid down in Articles 1 and 2 of the Charter, in particular the principle affirmed in paragraph 4 of Article 2: prohibition of the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations. Subject to the reservation made above on the primacy of the Security Council, recommendations for the

[23] *Cf.* also Art. 12 (1) of the U.N. Charter.
[24] See note 1, above, and below under VI.

establishment of an interposition force could well be based on this Article.

(4) The General Assembly may create a United Nations force under a standing resolution of its own. This was how, at the request of the Security Council,[25] the First Emergency Special Session of the General Assembly, at which UNEF was established, was so speedily convened. While no resolution of the General Assembly can add anything to the powers of the General Assembly under the Charter, the Uniting for Peace Resolution of November 3, 1950,[26] has enabled the General Assembly to speed up its own procedures[27] and, thus, to cope more expeditiously with proposals such as the establishment of an *ad hoc* interposition force.

(5) Under Article 22 of the Charter, the General Assembly may establish such subsidiary organs as it deems necessary for the performance of its functions. In a number of documents issued by the United Nations Secretariat, UNEF has been described as a subsidiary organ of the General Assembly under this Article.[28] Thus, if the General Assembly considers an interposition force necessary for the performance of its own functions, it need not limit itself to a mere recommendation, be it to member States or to the Security Council. It may well decide on the creation of such a force and make the necessary financial provision for this subsidiary organ under its own budgetary powers.[29]

On the face of it, each of the relevant Articles of the Charter can be so liberally interpreted as to permit the establishment of an interposition force by the General Assembly or by member States on the recommendation of the General Assembly. None the less, it may be objected that such a construction runs counter to the overall scheme envisaged in the Charter for the division of functions between the Security Council and the General Assembly.

[25] Res. S/3721—October 31, 1956.
[26] Res. 377 (V).
[27] *Cf.* Rules of Procedure of Gen.Ass. 8 (*b*), 9 (*b*), 10, 16, 19 and 65.
[28] See, for instance, ss. 19 and 127 of the *Report*, and para. 23. *Cf.* the Agreement between the United Nations and Egypt, February 8, 1957 (U.N.Doc. A/3526).
Contrary to the statement in s. 19 of the *Report* that the Regulations for the Force affirm its international character as a "subsidiary organ of the General Assembly" in Regulation 6 (U.N.Doc. St./SGB/UNEF/1) UNEF is described as a "subsidiary organ of the United Nations."
[29] Art. 17 of the Charter. The significance of this Article is rightly emphasised in Professor Sohn's paper, *loc. cit.*, note 1, above, p. 235. See also note 37, below.

Admittedly, in the preparatory material, some evidence can be found for great-power images of the Security Council as a world executive run in harmony by the great ones of this earth. In this view, the General Assembly is relegated to the position of a deliberative gathering in a minor key. Yet, in the Charter as it stands, the most that can be said is that, in relation to the General Assembly, the Security Council may claim a right of first refusal in matters affecting international peace and security. Moreover, in these matters, the General Assembly has in the main[30] merely a power of recommendation, whereas the Security Council has a power of decision. Finally, in this field, the Security Council holds powers of attorney and direction in relation to all the members of the United Nations.

In circumstances in which, owing to the exercise of the veto by one of the permanent members under Chapter 7—or, under Chapter 6, because of a veto cast by a permanent member in the interest of another permanent member not entitled to vote—the Security Council is unable to function, the vision of the world directorate begins to fade. Then, insistence on allegedly exclusive competences of the Security Council becomes increasingly indistinguishable from insistence on the perpetuation of world anarchy in the best tradition of the Polish veto of yore. Similarly, and for the same reasons which make the Security Council inoperative in situations of this kind, consultations initiated under Article 106 of the Charter by the permanent members of the Security Council are not likely to fare any better.

At this point, the General Assembly as the secondary organ in the field of the maintenance of world peace and security comes into its own. This place is granted to it by the Charter. Moreover, and this point is not always sufficiently emphasised, the General Assembly alone holds the purse strings of the Organisation. It may, therefore, justly claim primacy at least in so far as the financial *conditio sine qua non* of any executive action is concerned. It is true that in cases in which the General Assembly is limited to the making of recommendations, these fall short of

[30] See, however, above, under (5).

binding directions.[31] Yet, if the sense of the world's town meeting is beyond doubt—as, rightly or wrongly, it was over the 1956 interventions in Egypt—this limitation does not appear to matter provided that one condition is fulfilled. There must be a commensurate spontaneous response from the body of member States.[32] It must also be conceded that the General Assembly has no powers of attorney corresponding to those of the Security Council. Yet, as the organ of the United Nations in which all members are represented, it also has no need for such powers. Still, a residuary difficulty remains. The General Assembly lacks the power to co-ordinate dissident member States. The most it may do is, by the exercise of its budgetary power, to make such member States pay as anybody else for ventures of which they may disapprove.[33]

Thus, a limitation of the jurisdiction of the General Assembly exists which, in the abstract, compares unfavourably with the potentialities of the primary organ of the Organisation in matters affecting world peace and security. To overestimate the significance of these relative imperfections, would, however, be somewhat unrealistic. The secondary organ, with its constitutional limitations, comes into play only if its superior competitor is condemned to

[31] For sensible reaffirmations by the Secretary-General, which, at this stage, are salutary, that, in law, a recommendation is a recommendation and no more, *cf.* s. 9 of the Second and Final Report by the Secretary-General on the Plan for UNEF, November 6, 1956 (U.N.Doc. A/3302) and s. 19 of the further *Report* by the Secretary-General of February 11, 1957 (A/3527): "The Charter has given to the Security Council means of enforcement and the right to take decisions with mandatory effect. No such authority is given to the General Assembly, which can only recommend action to member governments, which, in turn, may follow the recommendations or disregard them. . . . In this case also [recommendations under the Uniting for Peace Resolution], the recommendation has not compulsory force."

See further, *ibid.*, s. 20, the Separate Opinions by Judges Klaestad and Lauterpacht in the Advisory Opinion of the I.C.J. on *Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South-West Africa*, *I.C.J. Reports 1955*, pp. 87–88 and 115–121, and the balanced evaluations by Sloan (25 B.Y.I.L. (1948), pp. 1 *et seq.*) and Johnson, 32 *ibid.* (1955–56), pp. 97 *et seq.*

[32] On the impressive and immediate flow of offers of armed and other assistance in connection with UNEF, *cf.* the annexes to the *Report* by the Secretary-General, November 6, 1956 (U.N.Doc. A/3302 and addenda 1–30, November 6–December 11, 1956).

The duties of member States arising directly from the Charter under Art. 2 (5) appear to be limited to "action" taken by the Security Council under Chap. 7 of the Charter.

[33] In the Special Political Committee (*loc. cit.*, note 21, above), the members of the Soviet bloc repeated their unwillingness to pay their share in the U.N. expenses of UNEF.

complete inaction beyond going through empty motions. In such contingencies, an organ which, otherwise, may fulfil chiefly reserve functions but is capable and willing to play its part, no longer compares so unfavourably with a primary organ which fails to function.[34]

(c) Finally, the *Secretariat*, as one of the principal organs of the United Nations under Article 7 of the Charter, must be considered as a potential bearer of authority to establish an interposition force. The first holder of the office of Secretary-General was convinced that he had the necessary authority to recruit a guard force for the protection of United Nations officials and property as well as of areas where, under the Charter or special arrangements, the United Nations had assumed control.[35] In a form which reduced Mr. Trygve Lie's original proposals to still more modest proportions, the General Assembly confirmed that, subject to budgetary limitations and its normal administrative control, the Secretary-General was entitled to establish a uniformed, but normally unarmed United Nations Field Service. The General Assembly also requested him to establish a panel of field observers.[36]

At a stretch, the authority of the Secretary-General to establish an interposition force can perhaps also be derived from any one of three provisions on which Mr. Trygve Lie had relied:

(1) Under Article 97, the United Nations Secretariat shall comprise such staff as the Organisation may require. Thus, in the first place, it falls on the Secretary-General as the chief administrative officer of the United Nations to decide whether the needs of the Organisation call for the creation of an interposition force as an

[34] See, however, Stone, *loc. cit.*, note 1, above, pp. 178 and 192 *et seq.*

[35] Report by the Secretary-General on a United Nations Guard, September 28, 1948 (U.N.Doc. A/656), s. 10, and App. A.

The Secretary-General considered, however, that the guard force could not be used for purposes of enforcement measures under Art. 42 of the Charter (*ibid.*, App. A, s. 2). While, from a pragmatic point of view, much may be said in favour of this, the text of Art. 42 is not so phrased as to preclude action by forces other than those created under Art. 43. Similarly, while, pending the conclusion of the special agreements referred to in Art. 43, the Powers mentioned in Art. 106 are entrusted with interim functions on behalf of the Organisation which, otherwise, they would lack, these powers need not necessarily be construed as exclusive.

[36] Res. of November 22, 1949 (297/IV). See further Schwebel in Frye, *loc. cit.*, note 1, above, pp. 195 *et seq.*

ad hoc measure or on a more permanent footing. While the Charter appears to permit the exercise of this function, the budgetary control of the General Assembly over the Secretary-General makes it inadvisable for him to take any such step without the backing of the General Assembly.[37] Moreover, the injunctions, preventing members of the Secretariat from accepting instructions from authorities external to the Organisation[38] would appear to preclude acceptance of national contingents on the UNEF pattern with its division of control between the United Nations and contributing States over members of the Force.[39] They would, however, be entirely compatible with a force directly and individually recruited by the Secretariat.

(2) Under Article 98, the Secretary-General has to perform any functions entrusted to him by any of the other principal organs of the United Nations. Thus, under delegation of authority from the General Assembly, the Secretary-General discharges his more important responsibilities in relation to UNEF. Moreover, in the planning and operation of the Force, the Secretary-General has the assistance of an Advisory Committee which is composed of representatives of seven member States, and of which he is the chairman.[40]

(3) Under an early Resolution,[41] the General Assembly had delegated to the Secretary-General a wide and still not yet exhausted authority which may be considered sufficiently wide to cover the establishment of an interposition force. He is charged with establishing an administrative organisation which will permit the "effective discharge of his administrative and general responsibilities under the Charter, and the efficient performance of those functions and services required to meet the needs of the several organs of the United Nations."

In sum, both the General Assembly and the Security Council and, probably, even the Secretariat have adequate authority under

37 *Cf. Report*, ss. 28 and 108 *et seq.*
38 Art. 100 of the Charter.
39 *Cf. Report*, ss. 75 *et seq.* and 139, Regulations 11 *et seq.* of the UNEF Regulations.
40 *Report*, ss. 26 *et seq.*, 84 *et seq.*, 172 and 174 *et seq.*
41 Res. of February 13, 1946 (13–I).

the Charter to establish an interposition force on the UNEF pattern.

V. Authority to Operate an Interposition Force

In the Secretary-General's *Report*, a clear and necessary distinction is drawn between authority to establish and operate an interposition force.[42] At this point, the limitations of the UNEF model become painfully manifest. A force operated by the General Assembly—or, for that matter, by the Secretary-General—as distinct from the Security Council depends at every stage on the consent of each member State concerned. It cannot rely on limitations of national sovereignty such as member States have granted under the Charter to the Security Council.

How much a force must rely on the consent of individual member States will emerge from a tabulation of the typical arrangements of a consensual character which are required for its successful operation:

(1) Consent by the States providing national contingents regarding their contributions of personnel, equipment and supplies, use and control of their contingents, length of service and reimbursement for extra costs incurred by contributing States.[43]

(2) Consent by the territorial sovereign of any staging area in which, prior to the dispatch of the force to the area of operation, the national contingents are assembled, and of any territory through or over which contingents may have to pass.[44] If the members of the force were individually recruited, and the intention was to station them in the territory of any sovereign State, again the problem of consent would arise.[45]

[42] See, for instance, s. 15. *Cf.* also s. 9 of the *Report* by the Secretary-General of November 6, 1956 (U.N.Doc. A/3302).

[43] For the text of the agreements concluded between the United Nations and member States contributing contingents to UNEF, see *Report*, Annex 1. *Cf.* also ss. 15 *et seq.*, 24, 44 *et seq.*, 75 *et seq.* and 125 *et seq.*

[44] *Ibid.*, ss. 35 and 131.

[45] Although an interposition force which forms a subsidiary organ of the United Nations is entitled under Art. 105 of the Charter and the General Convention on Privileges and Immunities of the United Nations (February 13, 1946) to the privileges and immunities there laid down (*cf. Report*, s. 129), these provisions apply only if a member State has admitted members of the subsidiary organ in their official capacity. Moreover, in the case of a force composed of national contingents, the provisions of the Convention do not automatically extend to

(3) Consent by the host State to receive the force with suitable privileges and immunities and to grant it all requisite facilities for free movement and communication, including signals communications, as well as the unhindered discharge of its appointed tasks.[46]

(4) Depending on the circumstances, consent by the opponents of the host State to the deployment of the force so as to enable it to fulfil its function of interposition.[47]

VI. The Outlook

Whether UNEF will be remembered as freak or precedent is still very much in the balance. Four constructive uses of the UNEF experience call for consideration.

(a) The line of least resistance would be that taken by the Secretary-General in the Special Political Committee of the General Assembly.[48] It would merely involve filing the relevant material for reference and using it to the best advantage in future emergencies of a similar type.

(b) Another possibility would be, as is suggested in the Secretary-General's *Report*, to contemplate the drafting of stand-by agreements. In treaties of this kind, appropriate principles and rules could be incorporated. These might cover questions such as the typical functions of an interposition force,[49] chains of command and administrative control,[50] the division of responsibility for national contingents between the United Nations and contributing

supplies and equipment which are the property of national contingents or their home States (*cf. Report*, s. 129).

In view of the small size of the United Nations headquarters area alone, the possibility that, under the Headquarters Agreement of June 26, 1947, between the United Nations and the United States, the force could be stationed there, must be dismissed. See also the *Report* by the Secretary-General on a United Nations Guard, September 28, 1948 (U.N.Doc. A/656), App. C, s. 2.

[46] *Report*, ss. 69, 100–101, 128–136, 144–146, 156–161 and *Appendix*, s. 5, the *aide-mémoire* on the Basis for Presence and Functioning of UNEF in Egypt, annexed to the *Report* by the Secretary-General of November 20, 1956 (U.N.Doc. A/3375) and the Agreement between the United Nations and Egypt concerning the status of UNEF in Egypt, February 8, 1957 (A/3526).

[47] *Cf. Report*, ss. 21, 23 and 53 *et seq.*

[48] See under II, above.

[49] See under III, above.

[50] *Cf. Report*, ss. 75 *et seq.*

States,[51] the exercise of criminal jurisdiction over members of the force,[52] the immunities and privileges of the force, its members and Secretariat officials detailed to serve with the force,[53] their international protection, the settlement of disputes[54] and, finally, budgetary provisions for the maintenance of the force and reimbursements due to contributing States.[55] These stand-by agreements might well take the form of bilateral treaties between the United Nations, represented by the Secretary-General, and individual member States on the lines of a model convention approved by the General Assembly.[56]

(c) A more ambitious proposition would be the establishment of a permanent and individually recruited interposition force under the control of the General Assembly. This scheme has received a measure of support from a number of members of the United Nations, in particular, the United States of America,[57] and unqualified condemnation by the Soviet bloc.[58] If, in each instance,

[51] *Cf. ibid.*, ss. 79, 139 and 168.

[52] *Cf. ibid.*, ss. 136 and 163, and *Appendix*, ss. 5 and 7.

[53] *Cf. loc. cit.*, note 46, above.

[54] *Cf. Report*, ss. 141–143, 190–191 and *Appendix*, ss. 11–12. See also Regulations 29 and 30 of UNEF Regulations.

[55] *Cf. loc. cit.*, note 43, above, Gen.Ass. Resolutions 1089 (XI), 1090 (XI), 1122 (XI) and 1151 (XII), and *Report*, ss. 48, 103 *et seq.*, 142 and 187–189. See also the *Report* by the Secretary-General of November 21, 1956 (U.N.Doc. A/3383 and Rev. 1); the Reports by the Advisory Committee on Administrative and Budgetary Questions, November 30, 1956 (A/3402), and December 14, 1956 (A/3456); the *Report* of the Fifth Committee of the Gen.Ass., February 25, 1957 (A/3560), and UNEF Budget Estimates for the period January 1 to December 31, 1958 (A/3823), and for the period January 1 to December 31, 1959 (A/3984).

[56] *Cf. Report*, s. 126 and *Appendix*, s. 3, and further Zemanek, *Das Vertragsrecht der Internationalen Organisationen*, 1957 (with full bibliography, pp. 149 *et seq.*).

[57] "I believe this Assembly should take action looking toward the creation of a stand-by United Nations peace force. The need for such a force is being clearly demonstrated by recent events" (Gen.Ass., Third Special Emergency Session, August 13, 1958, Off.Rec., p. 8).

On July 22, 1958, the United States Senate Foreign Relations Committee had adopted a resolution, proposing a permanent United Nations Emergency Force, composed of national contingents from member States other than permanent members of the Security Council and volunteers other than nationals of permanent members.

For Mr. Sandys' reflections on the same subject, *cf. Hansard*, House of Commons, June 10, 1958 (Vol. 589, cols. 76–77), and, on earlier official proposals, Aufricht, *loc. cit.*, note 1, above, pp. 225–226; Sohn, *ibid.*, p. 229, n. 2; and Stone, *ibid.*, p. 185, n. 5.

[58] "Recently, certain circles had made a great deal of fuss about the valuable experience which it was alleged UNEF had acquired after two years of operation, and had even gone so far as to represent the Force as the only safeguard of peace and security in the Arab East. However, it was well known that the purpose of these fine words was to cloak the real designs of the Western

the operation of a permanent force depends on prior consent by each State concerned as in the case of an *ad hoc* force,[59] it may well be doubted whether the advantages of permanency would justify the additional expense involved.[60] At the same time, the astronomical figures of present-day national armaments expenditure must be taken into consideration. They put into proper perspective the relative insignificance of the likely costs of a permanent United Nations force.[61]

(d) It remains to consider another possibility which may have been too lightly dismissed. This is an interposition force operating under the authority of the Security Council. The attractiveness of this pattern is evident. The directionary powers of the Security Council under Chapter 7 of the Charter and the powers of the Council as the agent of each member State would dispense with the need for further consent from member States which, in any future experiment on UNEF lines, might hamstring a force operating under the authority of the General Assembly.[62] Yet, on the surface, this pattern appears to suffer from an obvious drawback: the Security Council's chronic allergy to the veto power of its permanent members.

Until a state of rough and ready nuclear stalemate had been reached between the world Powers,[63] it would have been unrealistic to think in terms of revitalising the Security Council. It may still be premature to anticipate a period of positive co-operation between the world blocs. The time appears, however, ripe for thinking at least of situations in which the permanent members of the Security

Powers, which wanted to prove the need to set up a United Nations international police force on a permanent basis in order to use it for aggressive purposes" (M. Sobolev, U.S.S.R., in the Special Political Committee of the Gen.Ass., November 1, 1958—U.N.Doc. A/SPC/SR.97, p. 5).

59 See under V, above.

60 *Cf. Report*, ss. 84 and 153.
For estimates of the cost of a permanent U.N. Force, see Frye, *loc. cit.*, note 1, above, pp. 77 *et seq*

61 The United States Defence budget for 1959–60 is $46 milliard (President's Budget Message to Congress, 1959).
The overall costs of one Atlas missile amount to $35 million and the estimate for the United States missile programme for 1959–60 is $7 milliard (President Eisenhower's State of the Union Message, January 9, 1959).

62 See under IV and V, above.

63 See further 13 *Year Book of World Affairs* (1959), pp. 236 *et seq.*

Council may contemplate adopting a policy of mutual self-neutralisation and employ *ad hoc* or permanent interposition forces as symbols of their self-neutralisation.

Five types of situation in which it might be possible to operate an interposition force without any veto being cast readily suggest themselves:

(1) Situations in which a permanent member of the Security Council has made a miscalculation in imagining as expendable an area over which its opponents are willing to fight. In such a contingency, an interposition force may well facilitate a withdrawal which, otherwise, might involve an intolerable loss of face.

(2) Situations in which concurrence in the operation of an interposition force constitutes a dignified form of dissociation from unilateral action taken by an allied or non-committed Power.

(3) Situations in marginal areas near the world frontier where the operation of an interposition force would assist in thwarting attempts by junior partners or satellites to commit their own allies further than these may wish to be committed.

(4) Situations in which a direction by the Security Council to station an interposition force in frontier districts would strengthen the hands of a local government against extremists in its own civilian population or armed forces who may be inclined to provoke international incidents.

(5) Situations in which the permanent members of the Security Council decide to abstain from competing with each other in areas such as the Antarctic or outer space and agree to establish specialised agencies with exclusive jurisdiction in such areas. At this point, self-neutralisation would change into positive co-operation, and an international force the interposition task of which would become purely notional would discharge tasks of an international police force in the functional meaning of the term.

If the diagnosis of the present phase of world affairs as one of stalemate were acceptable to the permanent members of the Security Council, and they were prepared to make the most of this fleeting opportunity, proposals for a permanent United Nations force might appear less extravagant than while it had to be taken for granted that such a force would have to operate under the

direction of the General Assembly. If, in addition, the Security Council agreed to establish an individually recruited force, it would neither depend on offers of contingents by individual member States nor on the prior conclusion of agreements under Article 43 of the Charter. The Security Council would even be within its rights to issue directions to member States in the interest of the maintenance of international peace and security regarding the stationing of non-operational units of the force.[64]

However constituted, a United Nations force of this type could but benefit from acceptance of three principles which have proved themselves in UNEF field work:

First, exclusion on all levels of administrative and operational control, as well as membership of the force, of nationals of permanent members of the Security Council and non-employment in any particular operation of nationals of any State with a pronounced sectional interest in that dispute.[65]

Secondly, strict distinction in any area under the control of a sovereign State between the international functions of the interposition force and tasks within the exclusive jurisdiction of the local territorial sovereign, and firm limitation of the force to the fulfilment of the former.[66]

Thirdly, restriction of the functions of the force in areas not under its exclusive jurisdiction[67] to those of an interposition force.[68]

A force of this description under the control of the Security Council falls far short of the type of police force which, since the days of Andrew Carnegie, van Vollenhoven and Lord Davies, the pioneers in this field had imagined.[69] It would, however, be something less anaemic than a force dependent on the vagaries of shifting majorities in the General Assembly and the goodwill of the

64 See under III and note 45, above.
65 *Cf.* Gen.Ass. Resolution 1000 (ES–I), November 5, 1956, and *Report*, ss. 13–16, 44–47, 160–161 and 181.
66 *Cf. ibid.*, s. 165. See also s. 6 of the *Report* by the Secretary-General, November 21, 1956 (U.N.Doc. A/3384), s. 5, of his *Report* of January 24, 1957 (A/3512) and Reg. 6 of the UNEF Regulations.
67 In situations other than those outlined under (5).
68 *Cf. Report*, ss. 12, 62 and 167.
69 See further Lord Davies, *The Problem of the Twentieth Century* (1930) and *Force* (1934) and the bibliography, *loc. cit.* note 2, above.

parties directly concerned. At least, it could claim to rest on the one solid foundation that exists for the semblance of world order that may be attainable in the foreseeable future on the level of the United Nations: the willingness of the world Powers to throw a few bridges across the world abyss.

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